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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Oklahoma Supreme Court held that a biased decisionmaker could participate in a ratemaking proceeding because (1) procedural due process protections do not apply to ratemaking proceedings; or alternatively (2) the Rule of Necessity justifies the participation of biased decisionmaking on adjudicatory bodies where no statutory means for replacing them is available. In light of this holding, the question presented is: Whether States may deny all procedural due process protection in ratemaking proceedings, by labelling such proceedings "legislative" and applying the Rule of Necessity.

PARTIES TO THE PROCEEDING

Petitioner Southwestern Bell Telephone Company was petitioner below on petition to the Oklahoma Supreme Court for a writ of prohibition. Respondent Oklahoma Corporation Commission was respondent below.

Pursuant to this Court's Rule 29.1, petitioner notes that its parent is Southwestern Bell Corporation. Southwestern Bell Corporation has 16 directly owned subsidiaries in addition to Southwestern Bell Telephone Company, all of which are, like Southwestern Bell Telephone Company, wholly owned by Southwestern Bell Corporation. Southwestern Bell Telephone Company has two non-wholly-owned subsidiaries: Bell Communications Research, Inc. and Database Services Management, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Southwestern Bell Telephone Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Supreme Court entered in the above-captioned case on April 13, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma after rehearing, dated April 13, 1994, is reported at 873 P.2d 1001 and is reproduced at pages 1a-59a of the appendix to this petition ("Pet. App."). The initial opinion of the Supreme Court of Oklahoma, dated May 25, 1993, has been withdrawn, but is reproduced at Pet. App. 60a-74a. The opinion of the Supreme Court of Oklahoma in the underlying rate hearing is reported as *State ex rel.*

Henry v. Southwestern Bell Tel. Co., 825 P.2d 1305 (Okla. 1991), and is reproduced at Pet. App. 75a-102a.

JURISDICTION

Petitioner Southwestern Bell Telephone Company sought from the Oklahoma Supreme Court a writ of prohibition to disqualify one of the three Oklahoma Corporation Commissioners from participating in Southwestern Bell Telephone Company cases before the Oklahoma Corporation Commission. The Oklahoma Supreme Court accepted jurisdiction and granted the writ in an opinion dated May 25, 1993. After a timely motion for rehearing, the Oklahoma Supreme Court reversed itself and denied Southwestern Bell's request in a judgment and opinion dated April 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The provisions of the Oklahoma Constitution involved in this case, Art. 9, §§ 16-20, are reproduced at Pet. App. 103a-110a.

STATEMENT OF THE CASE

This case brings before the Court an important, foundational issue in the modern administrative state—whether the Due Process Clause affords protection to companies whose rates are regulated by the several States. In a dramatic about-face, the Oklahoma Supreme Court reversed its earlier ruling and answered that question in the negative. That action not only banished from the shelter of due process a system of civil adjudication that affects millions of ordinary citizens and determines utility

rates worth billions of dollars, but it brought about a revolution in traditional understandings of the rule of law in state ratemaking proceedings.

This case arises out of proceedings before the Oklahoma Corporation Commission, Oklahoma's most powerful administrative agency. Comprised of three elected commissioners, the commission regulates public utilities, common carriers, the oil and gas industry, and a host of miscellaneous activity.

The case involves an Oklahoma Corporation Commissioner who revealed in 1992 that he had been secretly acting as an FBI informant against Southwestern Bell Telephone Company ("SWB") since his election to the Commission in 1988. On October 2, 1992, a month before a congressional election in which he was an unsuccessful candidate, Corporation Commissioner Robert H. "Bob" Anthony announced publicly that he had "worked with the FBI" for the previous four years "to investigate corruption at the Corporation Commission." Though often phrased in general terms, Commissioner Anthony's statement repeatedly named SWB, but no other utilities. Anthony described activities he had undertaken as an undercover informant, and he implied that he anticipated serving as a witness against the accused utilities in future criminal proceedings.[1]

One week after his announcement, Commissioner Anthony filed an administrative discovery request against Southwestern Bell, requesting documents related not to

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[1] This expectation has not been realized. The FBI's investigation has concluded, and no current or former Southwestern Bell employees have been indicted as a result of it. The one figure connected to SWB who was indicted, a lawyer who formerly served SWB and other regulated companies as outside counsel, has yet to be tried. For the record, Southwestern Bell's position is this: Any impropriety that may have been committed was not authorized by or attributable to it.

any regulatory issues, but to his investigation of alleged corruption. Some months later, he revealed that, as part of his FBI informant activities, he had secretly tape-recorded conversations with Southwestern Bell employees and lawyers. All this occurred at times when Commissioner Anthony was presiding over regulatory cases in which SWB was a party. Commissioner Anthony asserted that his actions—and the timing of his announcement of them—were not determined by motives of political gain: "I come forward at this time." he said, "because the parties to cases at the Corporation Commission have rights which must be protected." He declared, "The parties to this case should pursue whatever remedies are necessary to protect their rights." *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001, 1003 n.1 (Okla. 1994) ("*SWB II*"), 2a. Southwestern Bell responded to this invitation by requesting Commissioner Anthony's recusal on grounds of bias under the federal Due Process Clause.

A. Due Process and State Administrative Agencies

The Due Process Clause of the Fourteenth Amendment requires State administrative agencies to adhere to fair procedure when deciding cases that could deprive parties of life, liberty, or property. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). One aspect of this right is the due process requirement of a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). At least since *Tumey v. Ohio*, 273 U.S. 510 (1927), the rule has been that "[o]ne is entitled as a matter of due process of law" to an adjudicator not situated so as to " 'offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true . . . .' " *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern*

California, 113 S. Ct. 2264, 2277 (1993) (quoting *Tumey*, 273 U.S. at 532). "[J]ustice must satisfy the appearance of justice." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)). As will be seen, the Oklahoma Supreme Court has flouted these fundamental principles.

B. Proceedings Below

The case in which Mr. Anthony's accusations against Southwestern Bell arose, captioned Cause No. PUD-260, was, until his announcement, a straightforward ratemaking proceeding. Because of tax savings from the 1986 Tax Reform Act, Southwestern Bell accumulated a $30 million "cash surplus" between 1987 and 1989, which it agreed in principle to refund to its customers. At issue in PUD-260 was not the gross amount of SWB's tax savings, but the amount of possible offsets to that surplus and the method by which SWB should refund it. After the Commission ruled on these issues, the Commission's order was reviewed by the Oklahoma Supreme Court, *State ex rel. Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305, 1309 (Okla. 1991), 80a, which approved an in-kind refund through investing the surplus in upgraded equipment. The Court then remanded the case to the Commission for further consideration of four technical issues specific to SWB, namely which "central office" facilities were most in need of improvement, *id.* at 1313, 88a; and the appropriate offsets to the gross surplus for "depreciation reserve deficiencies," *id.* at 1314-17, 89a-96a; severance pay, *id.* at 1317-18, 96a-98a; and "cash working capital," *id.* at 1318-19, 98a-100a.

Shortly after Commissioner Anthony's dramatic announcement, Southwestern Bell accepted his invitation "to pursue whatever remedies are necessary to protect [its] rights," *SWB II*, 873 P.2d at 1003 n.1, 2a, and filed a motion with the Commission requesting Commissioner Anthony's recusal from the PUD-260 remand proceedings and future SWB cases. When that motion was re-

buffed by the Commission, Southwestern Bell petitioned the Oklahoma Supreme Court for the same relief, arguing that recusal was required by the Due Process Clause of the United States Constitution.

In its initial decision, the Oklahoma Supreme Court, speaking through Justice Opala for a 6-1 majority, agreed that "[b]ecause the principle of impartiality that governs the *cold neutrality and detachment* of judges applies with equal force to administrative adjudicators," Commissioner Anthony had to be disqualified from participating in PUD-260. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, No. 80,579, slip op. at 4-5 (Okla., May 25, 1993) ("*SWB I*") (emphasis in original), 64a. The court then adapted certain existing statutory procedures to allow the Oklahoma Governor to appoint a replacement for Commissioner Anthony to serve in his stead in this one case. The court "save[d] for another day" the issue of whether Commissioner Anthony should similarly be disqualified from *future* SWB rate proceedings. *SWB I* at 5, 65a.

Alone in dissent, Justice Simms objected to the Court's willingness to countenance the participation in Corporation Commission proceedings of an unelected Commissioner. He said, "Today the majority has stripped the sovereign power of the people of this State to choose the members of the Corporation Commission and placed it in the hands of this Court and the Governor." *SWB I*, slip op. dissent at 1 (Simms, J., dissenting), 72a. Justice Simms also invoked *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), an opinion authored by Justice Holmes interpreting a federal statute forbidding federal courts to enjoin state judicial proceedings. Justice Simms cited *Prentis* for the proposition that "rate-making is a legislative function of the Corporation Commission" and argued that "persons acting in a legislative capacity" need not "meet standards [of impartiality] required of judicial decision makers." *SWB I*, slip op. dissent at 2, 72a-73a.

In response to this dissent, the Corporation Commission, relying on *Prentis*, petitioned the Oklahoma Supreme Court to reconsider its decision.

On rehearing, the Oklahoma Supreme Court did an about face. In a 5-4 opinion joined by Justice Simms, Justices Wilson and Watt, who had changed their minds, and two Oklahoma appellate judges sitting by designation for recused justices, the court relied on the narrow *Prentis* argument of Justice Simms's earlier dissent. The court reasoned that all ratemaking is "legislative" and that the Due Process Clause places *no* limitations on the conduct of legislative proceedings. For good measure, it also denied Southwestern Bell's claim a second time, relying on the so-called "Rule of Necessity." Commissioner Anthony's participation was necessary under this rule, the court explained, because no statutory mechanism existed for his replacement, and without him, the remaining two commissioners might deadlock. The court made clear that its reasoning would compel it to deny *all* due process claims arising from ratemaking proceedings. Justice Opala, the author of the original decision, issued a scholarly dissent, 19a-59a, arguing that due process protections against biased decisionmakers apply fully in cases of "individual ratemaking." 19a.

REASONS FOR GRANTING THE WRIT

I. THE OKLAHOMA SUPREME COURT DECISION VIOLATES THIS COURT'S DUE PROCESS PRECEDENTS ON A MATTER OF CRITICAL IMPORTANCE TO UTILITIES AND THEIR CUSTOMERS.

Instead of faithfully applying this Court's due process precedents, the Oklahoma Supreme Court sought assiduously to avoid having to disqualify an obviously biased Corporation Commissioner. First, it embarked on a safari through the U.S. Reports, tracking down decisions that could be cited for the proposition that ratemaking proceedings are "legislative" and hence not entitled to due process protection. Although ascertaining whether Southwestern Bell experienced a "depreciation reserve deficiency" between January 1987 and September 1989 scarcely seems a "legislative" endeavor, the court was able to bag and put to use several precedents implying that ratemaking is "essentially" a legislative act. Next, once it had collected this authority and used it in denying Southwestern Bell's petition, the court proceeded to deny due process protection in all likely future rate cases as well. The court's decision is wildly inconsistent with first principles of due process and is of profound importance in the high-stakes world of state ratemaking proceedings.

A. The Oklahoma Supreme Court's Determination That the Due Process Clause Does Not Apply to Ratemaking Proceedings Conflicts with This Court's Due Process Precedents.

The Oklahoma Supreme Court's *volte face* sounds the death knell for procedural due process in state ratemaking proceedings. Not surprisingly, this due process heresy finds no support in this Court's precedents.

First, the Oklahoma Supreme Court's decision finding that these individual ratemaking proceedings are "legisla-

tive," and hence unprotected by due process, directly conflicts with the decisions of this Court in *Londoner v. Denver*, 210 U.S. 373 (1908), *Bi-metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973). The Oklahoma court correctly assumed that "the rigid requirements designed for officials performing judicial or quasi-judicial functions," *Concrete Pipe*, 113 S. Ct. at 2277 (internal quotation marks and citation omitted), are not applicable to those acting in "legislative" capacities. In determining that these proceedings are "legislative," however, it ignored this Court's due process precedents. "The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Proces Clause of the Fourteenth Amendment"—namely, *Londoner* and *Bi-metallic*. *Florida E. Coast Ry.*, 410 U.S. at 244. In *Londoner*, this Court held that due process required that a landowner be given a hearing to contest the amount of an assessment levied specifically against his land. *See id.* at 244-45. In *Bi-metallic*, the Court held that due process did not require a hearing where the assessed "valuation of all taxable property in Denver" was increased. *Id.* at 245. Ratemaking "applicable across the board to all . . . common carriers" is therefore legislative; ratemaking that "single[s] out any particular" company is adjudicative. *Id.* at 245-46. Because the PUD-260 remand proceedings involve Southwestern Bell alone, the Oklahoma court's holding that they are "legislative" for purposes of due process conflicts with this Court's decisions.

Second, the Oklahoma Supreme Court's application to a due process claim of rules from other contexts holding (1) that ratemaking proceedings are legislative and (2) that proceedings having only prospective effect are legislative, likewise conflicts with this Court's due process decisions. In concluding that this proceeding is "legislative,"

the Oklahoma Supreme Court failed to cite the *Londoner/Bi-metallic* line of precedent—or any other due process decision of this Court. It appealed instead to this Court's decisions from other contexts, relying mainly on *Prentis*, which interpreted a statute limiting federal courts' authority to enjoin proceedings in state court.[2] The Oklahoma Supreme Court invoked *Prentis*'s dictum that "[t]he establishment of a rate is the making of a *rule for the future*, and therefore an act *legislative*, not judicial, in kind." *SWB II*, 873 P.2d at 1005 (emphasis added), 6a.

The Oklahoma Supreme Court's use of *Prentis*'s suggestions that "rule[s] for the future" are legislative and ratemaking proceedings are legislative as premises for concluding that ratemaking enjoys no due process protection conflicts with this Court's precedents. In *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933), this Court held that due process required notice and a hearing before a railroad could be ordered to upgrade a particular crossing. *Id.* at 199. Although the case manifestly involved what *Prentis* would style "a rule for the future," the Court expressly rejected the argument that due process was inapplicable because the administrative order demanding the upgrade was analogous to legislation. *Id.* at 197. Likewise, this Court has frequently held that

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[2] The Oklahoma court also relied on other cases not decided on due process grounds. *See SWB II*, 873 P.2d at 1005-06, 7a (citing *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989) (applying *Younger* abstention; "ratemaking is an essentially legislative act"); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1982) (applying statutes governing review of judgments of the District of Columbia Court of Appeals; "[*Prentis*] held . . . the Commission had acted in a legislative as opposed to a judicial capacity"); and *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945) (applying the Natural Gas Act of 1938; "[r]atemaking is essentially a legislative function")).

principles of due process, including "the fundamentals of a fair hearing," apply in cases involving ratemaking proceedings. *See West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 63, 70 (1935) (*"West Ohio I"*); *West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 79, 82 (1935) (*"West Ohio II"*); *accord Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292, 304-05 (1937).

Third, the remedy suggested by the Oklahoma court in lieu of Commissioner Anthony's disqualification is also in conflict with this Court's precedents. The Oklahoma court held that "review by heightened scrutiny in the appellate court" is an appropriate "means of compensation" for any possible bias by an official who has not been disqualified. *SWB II*, 873 P.2d at 1009, 15a. This conflicts with this Court's recent decision in *Concrete Pipe*, 113 S. Ct. at 2277, which held that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator."

Finally, even the apparent implicit basis for the Oklahoma ruling—the court's reluctance to disqualify an elected official—is in conflict with this Court's precedent. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), this Court addressed whether a system whereby the mayor tried traffic offenses and assessed fines, when the mayor was also responsible for the village's finances, denied offenders their due process right to a trial before a distinterested and impartial judicial officer. It held that due process required the mayor's disqualification.

B. The Oklahoma Supreme Court's Alternative Holding That the Rule of Necessity Can Defeat Southwestern Bell's Due Process Claim Conflicts with This Court's Precedents.

As an alternative ground for decision, the Oklahoma court held that the Rule of Necessity would prejudice Commissioner Anthony's disqualification, even in "judicial" proceedings. It reasoned that because "there [was] no mechanism in the law for appointment of a replacement commissioner," *SWB II*, 873 P.2d at 1009, 15a, and "the concurrence of a majority" could not be assured without one, *id.*, the Rule of Necessity precluded the disqualification. This logic is also in conflict with this Court's precedents.

First, the Oklahoma court's holding that the Rule of Necessity applies where recusal would not destroy the litigants' "right to a *forum*" conflicts with this Court's decision in *United States v. Will*, 449 U.S. 200, 212 (1980) (emphasis added). In *Will*, this Court held that even though all nine Justices had an interest in a case brought under the Compensation Clause of Article III, the Rule of Necessity barred the disqualification of the entire Court, because the parties were entitled to have their case heard. Here, the Oklahoma Constitution permits the Corporation Commission to conduct business and vote with a quorum of two members. *See* OKLA. CONST. art. 9, § 18a. Because disqualifying Commissioner Anthony would not destroy the Corporation Commission forum, the Rule of Necessity as defined by *Will* does not bar his recusal.

Second, the holding that Southwestern Bell's due process rights can be extinguished by the lack of a statutory method for replacing disqualified commissioners conflicts with this Court's decision in *Missouri v. Jenkins*, 495 U.S. 33, 56 (1990). *Jenkins* held that once a constitutional violation has been proved, state law limitations on a court's ability to provide an appropriate remedy need not

be respected. *See id.* at 57 (holding that local governments "may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation").

C. Under the Oklahoma Supreme Court's Decision Due Process Protection Will *Never* Apply in State Rate Proceedings.

Liberating the Corporation Commission from *any* due process limitations on its ratemaking authority, the Oklahoma Supreme Court not only refused to disqualify Commissioner Anthony in this case, but also reached out in various directions to expand the set of cases governed by its decision. Read fairly, the decision precludes any procedural due process claim made in any rate proceeding before any state administrative agency.

First, the decision precludes *any* reliance on the Due Process Clause in administrative proceedings deemed "legislative" under *Prentis*. Had the Oklahoma court followed the leading precedent from the District of Columbia Circuit, its determination that these proceedings were "legislative" would not have ended the analysis, but would have called for the application of the rule of *Association of Nat'l Advertisers v. FTC*, which applies to claims of bias in legislative agency proceedings. *See Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Instead, the court simply held that "due process notice and hearing requirements" are "inapplicabl[e]" to "legislative" proceedings and concluded, without more, that no due process violation had occurred. *SWB II*, 873 P.2d at 1006, 9a.

Second, the Oklahoma decision holds that *all* ratemaking proceedings are "legislative" in character. To be sure, the decision can be read to admit hope of due process applying in "judicial" rate proceedings, where a "judicial" proceeding is one which "investigates, declares and

enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *SWB II*, 873 P.2d at 1005, 6a (quoting *Prentis*, 211 U.S. at 226). The facts of this case demonstrate, however, that this is ephemeral. At issue in the PUD-260 remand is the computation and use of excess monies paid by SWB customers in 1987, 1988, and 1989—well before the 1992 date on which SWB first sought Commissioner Anthony's disqualification. Nevertheless, the Oklahoma Supreme Court did not so much as consider *Prentis*'s apparent rule that proceedings determining backward-looking liabilities are "judicial" and hence protected by the Due Process Clause. If these rate proceedings do not merit due process protection under the Oklahoma court's rule, none do.

Third, the Oklahoma decision applies not just to the right to an impartial adjudicator, but to due process rights generally. In deciding Southwestern Bell's narrow claim for Commissioner Anthony's disqualification for bias, the court indicated that its analysis would apply across the board to "due process notice and hearing requirements," *SWB II*, 873 P.2d at 1006, 9a; and that the right to a neutral adjudicator was simply one example of this entirely foreclosed category of claims. *Id.* (refusing to recognize "the application of due process requirements, including neutrality").

Fourth, after denying Southwestern Bell's claim on "legislative proceedings" grounds, the Oklahoma Supreme Court gratuitously denied it again under the Rule of Necessity. The court justified this overkill by arguing that "conserv[ing] judicial resources, as well as the resources of the rate payers" made it advisable to consider whether Commissioner Anthony could be disqualified from *future* judicial ratemaking proceedings. *SWB II*, 873 P.2d at 1009, 14a. Without examining any factual material, the court simply held that the Rule of Necessity demanded that "Commissioner Anthony would not be disqualified but would be allowed to continue to hear the

matter despite assertions of bias and prejudice." *SWB II*, 873 P.2d at 1009, 15a.

D. The Oklahoma Corporation Commission Wields Vast Powers That Ought Not Be Placed Beyond the Reach of Due Process.

The modest appellation, "Oklahoma Corporation Commission," does not suggest the extent of the power wielded by that body. According to its latest report, the Commission regulates 23,311 motor carriers, 35,000 miles of gas and hazardous liquid pipelines, 20 commercial oil field waste disposal pits, 197 public utilities, including 35 electric companies, 19 gas companies, 7 long-distance telephone companies, 46 local-exchange telephone companies, and on and on.[3] As in other States with their respective ratemaking machinery, only a small minority of Oklahoma citizens pass a month without paying a rate or using a service regulated by the Oklahoma Corporation Commission. In protecting the vast authority of this free-wheeling commission against any impairment by the Due Process Clause, the Oklahoma Supreme Court contradicted or ignored numerous decisions of this Court. Its implications for other States, now invited to shield ratemaking from federal due process scrutiny, are sobering for utilities and consumers alike. This case plainly warrants this Court's intervention.

II. THIS COURT'S REVIEW IS WARRANTED TO ESTABLISH THAT "RATEMAKING" IS NOT A CATEGORY OF DUE PROCESS ANALYSIS.

The doctrinal solecisms committed by the Oklahoma court appear in many state court decisions. Although this court's *due process precedents* certainly do not indicate that "ratemaking is legislative," state courts adjudi-

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[3] The list includes 28 waterworks, 62 cotton gins, 5,714 railroad track miles, 2 soil farms, 1,540 surface storage tanks, 21,453 underground storage tanks, 94,065 oil wells, 27,935 gas wells, and 27,622 underground injection and disposal wells.

cating due process claims in ratemaking proceedings often use the adage as a doctrinal lodestar.[4]

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[4] *See, e.g., Gulf States Utilities Co. v. Louisiana Public Serv. Comm'n*, 578 So.2d 71, 82-84 (La.) (ratemaking is legislative, so due process right to be heard by decisionmaker rather than hearing examiner not violated), *cert. denied*, 112 S. Ct. 637 (1991); *Northwestern Bell Tel. Co. v. Stofferahn*, 461 N.W.2d 129, 133-34 (S.D. 1990) (ratemaking is legislative for purposes of due process; *Association of Nat'l Advertisers* standard applies to disqualification for bias); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 445 N.W.2d 284, 295, 298 (Neb. 1989) ("Setting a rate . . . is a legislative act. . . . [T]he procedural due process requirement of notice and hearing" does not apply); *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328, 1332 (Wash.) (en banc) ("Since ratemaking is a legislative act, appellants' only due process right is in nonarbitrary rates."), *cert. denied*, 464 U.S. 982 (1983); *Tennessee Cable Television Ass'n v. Tennessee Public Serv. Comm'n*, 844 S.W.2d 151, 164-65 (Tenn. Ct. App. 1992) (different disqualification standards apply in ratemaking proceedings than in adjudicative proceedings); *Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Co.*, 571 A.2d 606 (Vt. 1989) (ratepayers not entitled to notice of rate hearing because "[r]atemaking proceedings that affect customers of a utility generally are legislative in nature"); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957, 958 (Okla. 1967) (ratepayer's challenge to rate order because of alleged bias of Commissioners denied, because ratemaking is legislative); *but see Hibbing Taconite Co. v. Minnesota Public Serv. Comm'n*, 302 N.W.2d 5, 9 (Minn. 1980) (ratemaking is *both* quasi-judicial and legislative; "court's failure to be more precise when discussing the two phases of ratemaking has led to the inappropriate statement that 'ratemaking is a legislative process' "); *New England Tel. & Tel. Co. v. Public Utilities Comm'n*, 448 A.2d 272, 280 (Me. 1982) (due process requires impartial hearing in ratemaking proceeding); *Business and Professional People for Public Interest v. Barnich*, 614 N.E.2d 341, 345 (Ill. App. Ct. 1993) (ratemaking proceedings are contested cases, judicial or quasi-judicial in nature, thus requiring same standards of disqualification for ratemaker's bias as for judge's bias); *Michigan Intra-State Motor Tariff Bureau, Inc. v. Public Serv. Comm'n*, 504 N.W.2d 677, 679, 682 (Mich. Ct. App. 1993) (ratemaking is legislative function, but the entities regulated are entitled to an impartial decisionmaker).

The reason for this confusion among the state courts is understandable: Federal courts generally, and this Court in particular, have had little occasion in recent years to address due process requirements for ratemaking proceedings. Since the most recent of the due process ratemaking decisions relied on above were decided—*see, West Coast I* (1935), *West Coast II* (1935), *Ohio Bell Telephone* (1937)—two sea changes have occurred in the law. First, Congress passed the Administrative Procedure Act. By affording parties in *federal* ratemaking proceedings all the process constitutionally due them, this statute has, as to federally set rates, made the Due Process Clause largely obsolete. Second, since the early 1940s this Court has recognized a host of abstention doctrines requiring federal courts to stay their hand in favor of State courts and regulatory bodies. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Today, when regulated companies attempt to attack *state* ratemaking procedures on due process grounds, they are met with a phalanx of abstention arguments on the way to the federal courthouse. *See, e.g., Fireman's Fund Ins. Co. v. Garamendi*, 790 F. Supp. 938 (N.D. Cal. 1992) (defendant requested abstention on federal constitutional claims, including due process claims, on basis of *Pullman, Burford, Younger*, and *Colorado River*; court grants abstention under latter three doctrines).

Because this Court used to address due process requirements for ratemaking, but no longer does so, state courts confronting such issues must either (1) apply the proper precedents from 50 to 100 years ago, or (2) apply recent decisions that are not on point. They mostly do the latter. If the resulting confusion in the state courts is to be dispelled, this Court should state authoritatively where the legislative-versus-adjudicative line is to be drawn *under the Due Process Clause.*

III. THIS COURT'S REVIEW IS WARRANTED TO RECONCILE CONFLICTING STATE COURT RULE OF NECESSITY DECISIONS.

The Rule of Necessity appears in many contexts other than ratemaking proceedings—disciplinary proceedings against public employees or licensed professionals, claims for public assistance, and adjudications concerning levies against real property are examples. Although sometimes styled a "common law" rule, as in this case, *see SWB II*, 873 P.2d 1009, 15a, the "common law" appellation is an obvious misnomer where, as here, it is used to jettison constitutional rights. In cases such as this, where unconstitutional bias has been alleged and the Rule of Necessity has been applied, the Rule of Necessity is a strand of due process analysis.

At present, the Rule of Necessity is a rule of absolute necessity in some jurisdictions and a rule of convenience in others. *Missouri v. Jenkins* notwithstanding, the Supreme Court of North Dakota held recently that "where no provision has been made" for substitute adjudicators, the Rule of Necessity "requires otherwise disqualified officers to serve." *Opdahl v. Zeeland Pub. School Dist. No. 4*, 512 N.W.2d 444, 446 (N.D. 1994). Yet other state supreme courts decline to apply the rule "merely because [a] town has not provided a procedure for replacing disqualified [adjudicators]." *See Clisham v. Board of Police Commissioners*, 613 A.2d 254, 265 (Conn. 1992). This Court's guidance is required if lower courts are to apply the rule consistently.[5]

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[5] Other decisions in conflict with Oklahoma Supreme Court's Rule of Necessity holding include *State ex rel. Brown v. City of O'Fallon*, 728 S.W.2d 595, 597-98 (Mo. Ct. App. 1987); *State v. Aldridge*, 103 So. 835, 838 (Ala. 1925); and *Stahl v. Board of Supervisors of Ringgold County*, 175 N.W. 772, 776 (Iowa 1920).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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Dated: July 12, 1994

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 80,579

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

Petitioner seeks this Court's assumption of original jurisdiction and petitions for writ of prohibition to disqualify Corporation Commissioner Anthony from further participation in PUD-260 and all pending or future cases involving petitioner before the Commission.

APPLICATION TO ASSUME ORIGINAL JURISDICTION GRANTED. PETITION FOR WRIT OF PROHIBITION DENIED.

REHEARING GRANTED AND OPINION OF THE COURT ISSUED MAY 25, 1993, IS WITHDRAWN AND THIS OPINION ORDERED SUBSTITUTED THEREFOR.

SIMMS, J:

In this original proceeding Southwestern Bell Telephone Company (SWB) seeks this Court's order disqualifying Corporation Commissioner Anthony (Anthony) from further participation in Corporation Commission proceeding PUD-260, a rate hearing, as well as in all pending and future SWB cases. SWB asserts that Anthony is biased and prejudiced against it, and his continued participation in cases where its substantive rights are at issue will deny SWB its right to due process of law because it will not be able to receive a fair hearing from an impartial tribunal.

I.

The focus of SWB's claim centers on Commissioner Anthony's starting public announcement on October 2, 1992, that for four years he had been secretly acting as an investigator and informant in an ongoing FBI investigation concerning the conduct of his fellow commissioners and employees and representatives of SWB.[1] SWB as-

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[1] That statement in its entirety follows:

"As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.

"As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner in 1989, individuals associated with regulated companies have offered me cash or inducements.

"With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave

serts that Anthony's announcement makes it clear that he has formed an opinion that SWB's agents and employees have engaged in improper conduct; that he has conflicting interests because of his different public and undisclosed roles, and, as a result of his investigation, he may be a potential witness in future proceedings against SWB. These facts, SWB argues, make it patently impossible for Anthony to be a neutral and unbiased adjudicator of its rights and interests before the Commission.

SWB argues that the same federal and state due process requirements which assure litigants in judicial proceedings a right to be heard by an impartial judge in a fair hearing apply with equal force in administrative hearings, and they should apply to the Corporation Commission hearing on PUD-260 and to Commissioner Anthony who sits, SWB contends, in an adjudicatory capacity. SWB asserts that Anthony's conduct and public statement, together with a motion he filed in the case below, seeking to compel SWB to produce certain records, present fundamental issues regarding its right to due process. SWB claims that Anthony's position is the same as a judge and the Canons of Judicial Conduct, 5 O.S. 1991, Ch. 1, App. 4, require him to voluntarily disqualify in these circumstances. Because he refuses to do so,

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to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.

"Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.

"I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse consequence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

this Court should exercise its Okla. Const. Art. 7, Sec. 4 superintending control over the judiciary and issue its writ to prohibit Anthony from further participation in an adjudicatory capacity in SWB's cases.

We assume original jurisdiction but deny the requested relief. Rehearing of our decision issued on May 25, 1993, is granted and that decision is withdrawn.

II.

The Corporation Commission is created by Article 9 of our Constitution. Its three members are elected by the people at a general election and a concurrence by a majority of the Commission is necessary to decide any question. Among the many powers and duties given the Commission, it is required to exercise the authority of the state to supervise, regulate and control public service corporations, and to that end it has been clothed with legislative, executive and judicial powers. Okla. Const. Art. 9, §§ 15, 18, 19, and 20. *St. Louis & S.F.R. Co. v. Williams,* 25 Okla. 662, 107 P. 428 (1910). *Russell v. Walker,* 160 Okla. 145, 15 P.2d 114 (1932); *Oklahoma Cotton Ginners' Ass'n. v. State,* 174 Okla. 243, 51 P.2d 327 (1935).

The validity of the union of these powers in one constitutional body has been upheld and found consistent with the sepaartion of powers provision, Okla. Const. Art. 4, § 1, as well as Okla. Const. Art. 7, § 1, which vests judicial power in certain constitutionally and statutorily created courts and tribunals. *Monson v. State, ex rel., Oklahoma Corp. Comm.,* 673 P.2d 839 (Okla. 1983); *Oklahoma Cotton Ginners' Ass'n.,* supra. In any proceeding the requirements which the Commission's actions must meet and the standards by which they are measured, depend on the character of the particular power being exercised in the matter at issue. *Monson,* supra; *Oklahoma Cotton Ginners' Ass'n.,* supra.

For example, in *Monson*, an action involving the drilling of salt water disposal wells, we recognized that when the Commission sits and decides matters in its adjudicative capacity, it exercises the power of a court of record pursuant to Okla. Const. Art. 9, § 19, and the Commission should therefore be treated as the "functional analogue of a court of record." We held that because the Commission's actions in question were a judicial function, the exemption acorded the judiciary in the Open Meeting Law would apply to the Commission. Likewise, in *Hair v. Okla. Corp. Comm.*, 740 P.2d 134 (Okla. 1987), which involved a drilling and spacing order, we held that because the Commission is considered a court of record when it is performing in a judicial capacity, it may correct its orders by order nunc pro tunc.

The proceeding at issue here, PUD-260, is a rate hearing.[2] The authority to establish rates for all public service corporations is exclusively vested in the Corporation Commission by Art. 9, § 18, of the Oklahoma Constitution. Rate hearings are legislative in nature, and SWB's assertion that this was a proceeding of a judicial nature is erroneous. *Turpen v. Oklahoma Corp. Comm.*, 769 P.2d 1309 (Okla. 1989); *State, ex rel. Cartwright v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983); *Chickasha Cotton Oil Co. v. Corp. Comm.*, 562 P.2d

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[2] PUD-260 began as an investigation into the effect of the Federal Tax Reform Act of 1986 on Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and remanded for further proceedings in *Henry v. Southwestern Bell*, 825 P.2d 1305 (Okla. 1992). No argument is advanced here that this is not a rate hearing nor could such an argument be sustained, for the Court found in *Henry* that the rates charged were authorized and were not obtained by overcharging ratepayers, and that the surplus cash at issue did not result from charges in excess of the legal rate. The Court specifically held at 1311 that the refund statute, 17 O.S. 1991, § 121, was therefore not applicable to these facts and afforded no authority for requiring the refund sought by the parties.

507 (Okla. 1977); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957 (Okla. 1967).

When Anthony and his fellow Commissioners hear PUD-260 they will act in their legislative capacity. That distinction is determinative of the issue presented for, as discussed below, proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards urged by SWB. More importantly, this Court has no power to grant the relief sought against constitutional officers acting in a legislative capacity.

In *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), the Supreme Court of the United States was asked to determine whether the federal courts could enjoin the Virginia Corporation Commission from enforcing railroad rates alleged to be confiscatory. At issue was the nature of the challenged commission action. The Virginia constitutional provision (which is nearly identical to provisions of our article 9) invested the Commission with legislative, executive, and judicial powers. The Court assumed that while the Commission was for some purposes, a court, which would be protected from interference by federal courts, in setting the rates the Commission had acted in a legislative capacity and could therefore be enjoined. Speaking through Justice Holmes, the court analyzed the distinctions between legislative and judicial proceedings:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, . . ."

The Court then made the point that:

> "Proceedings legislative in nature are not proceedings in a court, * * * no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends not upon the character of the body, but upon the character of the proceedings. * * * And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up . . . The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." 211 U.S. at 226-27, 29 S.Ct. at 69-70 (Citations omitted).

The Supreme Court of the United States has quite recently reaffirmed both the general mode of analysis used in *Prentis*, see *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and the specific holding of *Prentis* that ratemaking is a legislative act and ratemaking proceedings are legislative in nature. See *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U.S. 581, 65 S.Ct. 829, 89 L.Ed. 1206 (1945) and *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

We recognized and addressed the distinction between legislative and judicial functions in *Wiley v. Oklahoma Natural Gas*, 429 P.2d 957 (Okla. 1967), where, in a case with some obvious factual similarities to the matter

before us, we held the court was without power to declare rate increases void based on allegations that the Commission had been wrongfully influenced to approve them by contributions and favors from a lobbyist. The action was not an appeal from the amount of the rate as being either excessive or constitutionally confiscatory, only the decision making process was attacked. We stated:

> "It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules. It necessarily follows that a rate order is a legislative enactment and not a judgment of a Court. Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; Pioneer T. and T. Co. v. State, 40 Okl. 417, 138 P. 1033; 43 Am.Jur. Public Utilities and Services, Sec. 226; City of Poteau v. American Indian Oil and Gas Co., 159 Okl. 240, 18 P.2d 523; Ft. Smith and W. Ry. Co. v. State, 25 Okl. 866, 108 P. 407; Community Natural Gas Co. v. Corporation Commission, 182 Okl. 137, 76 P.2d 393; Western Oklahoma Gas and Fuel Co. v. State, 113 Okl. 126, 239 P. 588.
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> "In the last cited cases this Court said, at page 591 of the Pacific Reporter that 'in the last analysis an order of the Corporation Commission fixing rates is entitled to the same consideration as if the Legislature had fixed them * * *.'
>
> "It is equally well settled that the judiciary cannot annul or pronounce void any act of the Legislature on any ground other than that of repugnancy to the constitution. Constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The Court may not inquire into the motives of the Legislature, as motives cannot be made a subject of judicial inquiry for the

purpose of invalidating an act of the legislature." 429 P.2d at 958.

This recognition of the legislative nature of ratemaking proceedings and the resulting inapplicability of judicial concerns and standards, including due process notice and hearing requirements, has been repeatedly affirmed by this Court. In our recent decision in *State v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983), we set forth and relied on the following statement from *Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507, 509 (Okla. 1977):

> " 'We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners (users), unless specifically required by statute. There is no present statutory provision requiring notice.'
>
> Accord, *State ex rel. Oklahoma Natural Gas Co. v. Hughes*, Okl., 227 P.2d 666 (669)(1951)."

See *Southern Oil Corp. v. Yale Natural Gas Co.*, 89 Okla. 121, 214 P. 131 (1923); *City of Bartlesville v. Corporation Commission*, 82 Okla. 160, 199 P. 396 (1921); *Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507 (Okla. 1977); *State v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983); *Henry v. Corporation Commission*, 825 P.2d 1262 (Okla. 1992). See also, *Teleco, Inc. v. Southwestern Bell Telephone Co.*, 392 F.Supp. 692 (WD Okla.1974), *aff'd* 511 F.2d 949, *cert. denied*, 423 U.S. 875, 96 S.Ct. 145, 46 L.Ed.2d 106 (1974).

Based on the foregoing analysis we are convinced that SWB's position that this was a judicial proceeding where Commissioner Anthony was performing an adjudicatory function which demanded the application of due process requirements, including neutrality, is erroneous. Instead,

PUD-260 was unarguably legislative in nature, and while participating in it Commissioner Anthony was acting in a legislative capacity which did not require him to comply with judicial standards of conduct. Accordingly, this Court is without jurisdiction to disqualify Commissioner Anthony from participation in this or any other SWB rate hearing.

Additionally, because of the legislative character of these proceedings, mandamus will not lie to compel Anthony's disqualification. As the terms of 12 O.S.1991, § 1451 make clear, mandamus will issue only where petitioner has a clear legal right to the relief sought and respondent has a plain legal duty which he refuses to perform. These requisites, together with inadequacy of other relief, must coincide to warrant issuance of the writ. *Oklahoma Gas & Electric Co. v. District Court*, 784 P.2d 61 (Okla. 1989). Here, respondent has no legal duty to perform, and petitioner has no right to the relief sought. Neither is prohibition a proper remedy to reach an act which is legislative in nature. Prohibition will lie only where an inferior court or officer is acting in a judicial capacity exercising judicial or quasi-judicial power not granted by law or making an unauthorized or excessive application of judicial force. *James v. Rogers*, 734 P.2d 1298 (Okla. 1987); *Stover v. Alfalfa County Election Board*, 530 P.2d 1020 (Okla. 1975).

We are also unpersuaded by the additional argument urged by SWB that although the Corporation Commission is exempted from the provisions of Art. II of the Administrative Procedures Act, 75 O.S. Supp. 1992, §§ 308a, et seq., we should nonetheless hold it bound by provisions of that article which impose certain due process requirements on agency proceedings, and especially by the terms of § 316 which call for the disqualification of agency members in some situations. That section provides:

> "A hearing examiner or agency member shall withdraw from any individual proceeding in which he

> cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the Governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding. * * * "

The legislative nature of ratemaking ends any argument that the APA's standards of due process require treating the Commission the same as "other" agencies. Also, the Commission's constitutional creation distinguishes it from other administrative agencies which derive their authority "not from a direct constitutional grant but rather from statutory delegation." *Monson*, supra, at 842.

This statutory provision of directives for voluntary disqualification of agency members who sit by appointment and hearing officers who are agency employees together with a mechanism for their replacement, raise very different considerations from those presented by the situation before us. Here, we are asked to use the power of the judiciary to involuntarily disqualify an elected constitutional state officer in the absence of any constitutional or statutory provision allowing his disqualification or providing for a replacement. This Court has no power or authority to alter or interrupt the lawful term of Commissioner Anthony's office based on allegations of bias

in a rate hearing where he is acting in his legislative capacity, and any attempt to do so would be an encroachment by the judiciary on both the legislative and executive powers.

In addition to establishing his powers and duties, the constitution and statutes fix Commissioner Anthony's term of office. He is the legal incumbent and, pursuant to 51 O.S.1991, § 8, his office will not become vacant unless he should resign, die, move from the state, be convicted of certain offenses or be lawfully removed from office. *State, ex rel., Blankenship v. Freeman*, 440 P.2d 744 (Okla. 1968). The law does not recognize "bias" as creating a vacancy and, as no vacancy established by law exists, there is none to fill. *Carpenter v. Carter*, 167 Okla. 238, 29 P.2d 83 (1934).

Under Okla. Const. Art. 9, § 15 and 51 O.S.1991 § 10, the power to fill a vacancy in the office of Corporation Commissioner is placed in the governor. The law does not recognize a "temporary" vacancy as would result from a disqualification, however, as section 15 directs that the governor shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out the unexpired term.

The Court's lack of power to disqualify Commissioner Anthony from participation in SWB's rate hearing does not leave SWB defenseless and without a remedy for what it perceives as unfair treatment from a biased tribunal; SWB may appeal the Commission's rate order if it feels aggrieved by its provisions.

The denial of a fair rate of return resulting in confiscation of a utility's property is a constitutional concern of this Court. Okla. Const. Art. 9, § 20. After the ratemaking hearings on PUD-260 have concluded, if SWB believes that those Commission proceedings were so unfair because of Anthony's prejudice that the resulting rate order is unreasonable and confiscatory, it would be in a

position to assert that bias as a ground for reversal of the rate order. A record of the proceeding would exist to support its contentions of unfair treatment and arbitrary rulings on evidence and testimony.

As is appropriate in reviewing an order of the Corporation Commission involving an asserted constitutional violation, this Court will exercise its independent judgment as to both the law and the facts. *Atchison, Topeka & Santa Fe Ry. Co. v. State*, 692 P.2d 554 (Okla. 1984); *Application of Southwestern Bell Tel. Co.*, 575 P.2d 624 (Okla. 1978). We would therefore not be bound by the findings and conclusions of the Commission but would independently weigh the evidence in our determination of whether SWB had met its burden of proving the rates ordered by the Commission were confiscatory and fundamentally unfair.

III.

We recognize that an argument could be made that the provisions of Art. 9, § 20 which grant this Court the power to issue writs of mandamus and prohibition to the Commission in a proper case, support the power of this Court to disqualify a corporation commissioner, if he were sitting in a *judicial* capacity.

In pertinent part, that section provides:

> "From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, . . .
>
> . . . [I]n all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independ-

> ent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.
>
> No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, *that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.*" [Emphasis Added]

While this provision does not alter the fact that extraordinary relief would not be available to disqualify Anthony while acting in his legislative capacity, see *Wilson & Co., Inc. v. Oklahoma Gas & Electric Co.*, 190 Okla. 528, 126 P.2d 1009 (1942); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920), it might be argued that it could extend this Court's supervisory control over the issue of his disqualification while exercising judicial power. In this application SWB seeks relief in all its pending and future Commission matters in addition to PUD-260. We are aware that some of these proceedings may be of a judicial nature, and disqualification of Commissioner Anthony in his judicial capacity may be sought.

In an attempt to conserve judicial resources, as well as the resources of the rate payers, we observe in passing

that while an attempt to disqualify Anthony in a proceeding involving a judicial function might arguably be cognizable, it would likely lead to the same result reached in this legislative function decision today: Commissioner Anthony would not be disqualified but would be allowed to continue to hear the matter despite assertions of bias and prejudice. This is so because the "rule of necessity", which would undoubtedly be held applicable, would require that Anthony not be disqualified because the concurrence of a majority of the Commissioners is necessary for a decision, and there is no mechanism in the law for appointment of a replacement commissioner. The rule of necessity is a common law rule recognizing that a judge should not be disqualified where his jurisdiction is exclusive or there is no provision for appointing a replacement so that his disqualification would deny the constitutional right to a forum. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). The rule has been held applicable to state administrative proceedings where the administrative body was acting in an adjudicatory capacity. *Barker v. Secretary of State's Office of Missouri*, 752 S.W.2d 437 (Mo.App. 1988); *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D. 1974), *cert. denied*, 419 U.S. 1026, 95 S.Ct. 798, 42 L.Ed.2d 816 (1978). It operates on the principle that "a biased judge is better than no judge at all" and the disqualification of a judge cannot be allowed to "bar the doors to justice or to destroy the only tribunal vested with the power" to hear the matter. *Barker*, supra, at 440.

A review by heightened scrutiny in the appellate court has been adopted as one means of compensation for any taint of bias that arises from a decision reached by an administrator who cannot be disqualified because of the rule of necessity. In *Barker v. Secretary of State's Office*, supra, the court considered a situation similar to the one before us in many respects other than the fact it involved an adjudicative process rather than a legislative one.

There, Barker, an employee of the Secretary of State's office in Missouri, allegedly received a back injury at work and filed a workers compensation claim which was denied at trial. Representing Barker's employer at the trial was an assistant attorney general, Hannelore Fischer, who was later appointed to the Labor and Industrial Relations Commission which hears appeals from the workers compensation trial courts. This three-member commission ruled against Barker 2 to 1. Fischer took no part in the review until a stalemate occurred; her vote against Barker was the deciding one.

Barker then appealed the commission decision to the Missouri Court of Appeals arguing Fischer should have been disqualified. After a discussion of the rule of necessity, the appellate court determined that it must be applied in the case because the Commission is the only tribunal for review of workers compensation cases provided by Missouri law. The court further found that a valid decision by the commission must be by majority of two members and that no mechanism for substituting a disqualified member existed. Hence, for the commission to perform its role of reviewing workers compensation cases, the rule required Fischer to sit and hear the matter, disagreeable as it may have been to Barker.

The appellate court determined that a heightened scrutiny on review was warranted, and stated:

> "This [consideration of the rule of necessity] does not, however, end our inquiry. We have agonized at great length to arrive at a fair and just solution to the problem posed by the unusual circumstances in the instant case. To this end we adopt the suggestion made by Professor Davis in his treatise on administrative law. Davis in his review of the law of necessity states:
>
> > The doctrine is so clear that it is seldom litigated, but when it causes results that are pal-

> pably unjust, perhaps it ought to be litigated, because ways can sometimes be found to relieve against the injustice. Whenever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, *without altering the law about scope of review,* may and probably should review with special intensity.
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> 3 K. Davis Administrative Law Treatise § 19.9 (2d ed. 1980)
>
> The heightened scrutiny with which we review this case does not mean, however, that we are undertaking a de novo review. *Our scope of review is rigidly prescribed by statute and we will not stray out of the perimeters set for us by the legislature.*
>
> * * *
>
> *Our review of this case rather, will be done with a more critical eye than is usual. The record will be thoroughly examined to determine if any injustice has been done to Barker given the circumstances present.* 752 S.W.2d 441 (Emphasis added)."

If we applied the rule of necessity to a SWB adjudicatory matter with allegations similar to those urged here, it is likely that we would review the decision under a heightened appellate scrutiny or implement some other procedure to reach a just resolution of the competing interests involved in these strained circumstances.

We recognize that in a previous decision, *ETSI Pipeline Project, et al. v. Townsend,* Sup.Ct.No. 58,707, we granted a writ by unpublished order of September 9, 1982, disqualifying Commissioner Townsend from sitting in an adjudicative capacity. In that matter, however, no arguments were presented that the law did not provide for disqualification or replacement, and no argument as to the application of the rule of necessity was before us.

This order is not precedent. To the extent, however, that it is or may be seen as conflicting with today's decision, it is expressly overruled.

ORIGINAL JURISDICTION ASSUMED. PETITION FOR WRIT OF PROHIBITION DENIED. REHEARING GRANTED AND THE OPINION OF THE COURT ISSUED MAY 25, 1993 IS WITHDRAWN AND THIS OPINION IS ORDERED SUBSTITUTED THEREFOR.

SIMMS, WILSON, WATT, JJ., and ADAMS, SP.J., BOUDREAU, SP.J., CONCUR.

LAVENDER, V.C.J., HARGRAVE, OPALA, KAUGER, JJ., DISSENT.

HODGES, C.J., SUMMERS, J., DISQUALIFIED.

OPALA, J., dissenting.

This quest by Southwestern Bell Telephone Company [SWB] for a neutral and detached tribunal *does not turn* on whether the Corporation Commission's [Commission] public utility ratemaking may be described as "*legislative*" but rather on (1) *what process is constitutionally due* the corporate owners (stockholders) of a public utility when the State, acting in the exercise of its ratemaking powers, seeks to affect their property interests and on (2) whether Oklahoma may withdraw from the Commission's *individual ratemaking* [1] the basic protections of due process available to others by Art. II of the Oklahoma Administrative Procedures Act [APA] [2] without violating either the Equal Protection Clause of the 14th Amend., U.S. Const.,[3] or the uniformity-of-procedure mandate in Art. 5, § 46, Okl.Const.[4]

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[1] *Individual ratemaking* is agency action for the establishment of rates which is directed at particular parties. The agency ratemaking process is usually based on individualized fact-finding—i.e., that which affects particular individuals, their businesses, activities and properties. *See B. Schwartz, Administrative Law* § 5.8, 237-240 (1991).

[2] Ratemaking by agencies other than the Corporation Commission is explicitly excluded from Art. I rulemaking process (75 O.S.Supp. 1992 § 250.3(2)(b), *infra* note 28) and hence must be deemed to fall under the Art. II adjudicative process (75 O.S.1991 §§ 309 et seq.).

[3] For the pertinent terms of the Equal Protection Clause of the 14th Amend., § 1, U.S. Const., see *infra* note 97.

[4] For the pertinent terms of Art. 5, § 46, Okl.Const., see *infra* note 110.

Because the APA expressly exempts the Commission from compliance with the adjudicative process of Art. II (75 O.S.Supp.1993 § 250.4(B)(4)), although Art. I regulates some of the agency's rulemaking aspects, the replacement mechanism in § 316 for disqualified agency decisionmakers is not *statutorily* applicable to members of the Corporation Commission (75 O.S.Supp.1993 § 250.4(A)(2). For the APA's Art. I rulemaking process, see 75 O.S.1991 §§ 250.2 et seq.

The court is clearly in error when it pronounces today that because the Commission's function of public ratemaking is "legislative", it goes unshielded by any form of due process. Labeling ratemaking as legislative or adjudicative should be the beginning of today's inquiry into the reach of protections that are constitutionally due in an individual ratemaking proceeding. Like an ostrich that hides its head in sand to escape the unpleasant consequences of reality, the court today chooses to foist on Oklahoma *dated federal and state jurisprudence* long relegated to antiquarian lore by the more recent expressions from the U.S. Supreme Court.[5] The court's analysis, which begins and ends with reliance on first-generation federal cases, ignores a near-century of the most recent growth in the body of this Nation's constitutional law. That case law unequivocally teaches that ratemaking for application to a single public utility is clothed *with due process safeguards. Among those safeguards is the right to a neutral decisionmaker.*

I cannot accede to today's pronouncement that Commissioner Anthony may not be disqualified because he is acting in a legislative capacity. *The self-caponized court rests its powerlessness on a facial legal fallacy—its ipse dixit*[6] *that a legislator cannot be disqualified.* Our constitution, Art. 5, § 24,[7] clearly calls for legislative disqualification when a conflict of interest should arise. An elected executive official sitting as a legislative decisionmaker in an individual ratemaking proceeding in which he is required to utilize on-the-record adjudicative process should be no less vulnerable to disqualification than his

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[5] For detailed discussion of the discord between today's analysis and the current federal constitutional jurisprudence, see Part II, *infra.*

[6] *Ipse dixit* is defined by Black's Law Dictionary, p. 743 (5th Ed. 1979), as "a bare assertion resting on the authority of an individual."

[7] For the terms of Art. 5, § 24, Okl.Const., see *infra* note 44.

counterpart in the legislature who is found to have a conflict of interest.

The court's opinion also contravenes this Nation's fundamental charter by imposing a dichotomous division of ratemaking procedures that offends equal protection. While individual ratemaking by an APA-governed agency [8] is explicitly governed by the Art. II's adjudicative process,[9] *it now becomes pure legislation* when the very same process occurs before the Commission. This unequal remedial treatment the court imposes today violates *with like force* the uniformity-of-procedure mandate found in Art. 5, § 46, Okl.Const.[10] When state law is bereft of authority necessary to carry out federal constitutional commands, the U.S. Constitution mandates that this court place the Commission under the (Art. II's) § 316 [11] replacement mechanism of the APA.[12] In the alternative, a statutory replacement mechanism could be read into the provisions of Art. 6, § 13 [13] and Art. 9, § 15, Okl. Const.,[14] construed together with 51 O.S.1991 §§ 8 [15] and 10.[16]

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[8] An APA-governed agency is one whose adjudicative process must comply with the provisions of Art. II, 75 O.S.1991 §§ 309 et seq.

[9] *Ratemaking is adjudication under the provisions of the APA*, 75 O.S.Supp.1992 § 250.3(2)(b). For the text of § 250.3(2)(b), see *infra* note 28.

[10] For the pertinent terms of Art. 5, § 46, Okl.Const., see *infra* note 110.

[11] For the pertinent terms of 75 O.S.1991 § 316, see *infra* note 96.

[12] For a discussion of the federal fundamental-law replacement mechanism, see Part III, *infra*.

[13] For the pertinent terms of Art. 6, § 13, Okl.Const., see *infra* note 116.

[14] For the pertinent terms of Art. 9, § 15, Okl.Const., see *infra* note 115.

[15] For the pertinent terms of 51 O.S.1991 § 8, see *infra* note 118.

[16] For the pertinent terms of 51 O.S.1991 § 10, see *infra* note 119.

I would declare that Commissioner Anthony is disqualified and that the state and federal fundamental law affords an effective post-recusal mechanism for replacing him as a disqualified Commissioner.

I

RATEMAKING—BEFORE AND AFTER THE BIRTH OF AMERICAN ADMINISTRATIVE LAW

A. *Ratemaking As A "Legislative Function" Before The Birth Of Our Republic And Before The Advent Of State and Federal Administrative Law: The First-Generation Constitutional Teachings Of The U.S. Supreme Court*

The court's characterization of ratemaking as legislative [17] *is of no moment in reaching for the correct answer to today's question.* Ratemaking *was* the responsibility of the British Parliament before our tripartite division of government came into being.[18] In *Munn v. Illinois* [19] the

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[17] For this notion, the court relies today on Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), and on its *Oklahoma echo* in Henry v. Corporation Com'n, Okl., 825 P.2d 1262, 1266 (1992); State ex rel. Cartwright v. Southwestern Bell Tel. Co., Okl., 662 P.2d 675, 681 (1983); Chickasha Cotton Oil Co. v. Corp. Comm., Okl., 562 P.2d 507, 509-510 (1977); Wiley v. Oklahoma Natural Gas Co., Okl., 429 P.2d 957, 958 (1967); Southern Oil Corporation v. Yale Natural Gas Co., 89 Okl. 121, 214 P. 131, 135 (1923); City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 P. 396, 398 (1921); *see also* Teleco, Inc. v. Southwestern Bell Telephone Co., 392 F.Supp. 692, 698 (W.D.Okl. 1974), *aff'd*, 511 F.2d 949, *cert. denied* 423 U.S. 875, 96 S.Ct. 145, 46 L.Ed.2d 106 (1974).

[18] Before the founding of our Nation, the English Parliament set rates and tariffs by acts. *See* Munn v. Illinois, 94 U.S. 113, 123-124, 24 L.Ed. 77, 83-84 (1877), for a discussion of the extensive British and American antecedents in legislating specific rates for firms "affected with a public interest." *See also* CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES (Public Utilities Reports, Inc., 1988) at 81-85 and 117-123.

[19] *Munn, supra* note 18, 94 U.S. at 125-126, 24 L.Ed. at 84.

U.S. Supreme Court recognized the English institutional scheme and saw *no* necessity to alter it for adaptation to our constitutional order.

The court today *begins and ends* its analysis with the landmark decision in *Prentis v. Atlantic Coast Line* [20] but ignores post-*Prentis* jurisprudential growth. *Prentis*—*Munn's* direct progeny—teaches that ratemaking lies in the legislative realm. This statement means little more than that, as a relic of our British heritage, the *function* is traditionally defined as *lawmaking*. *Munn* and *Prentis* are a first-generation exposition of our constitutional framework. The Oklahoma cases [21] on which the court relies in today's pronouncement *mirror our national law of yore*—the law when *Munn* and its *Prentis* progeny carried the day. The recent reference to *Prentis* in *New Orleans Public Serv. v. Council of New Orleans* [22] has *no* greater significance than that the Court still views *Prentis* as viable precedent on the *essence* of ratemaking function rather than on the *procedural characteristics* of the individual ratemaking process.

While the concept of ratemaking as a legislative function has not been disturbed by the American constitutional order, *post-Prentis jurisprudence has superimposed upon its framework a host of due process protections.*[23] *Participation by a neutral and detached decisionmaker is one of several essential elements of due process which*

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[20] *Supra* note 17, 211 U.S. at 226-227, 29 S.Ct. at 69.

[21] For Oklahoma decisional law, see *supra* note 17.

[22] In New Orleans Public Serv. v. Council of New Orleans, 491 U.S. 350, 371, 109 S.Ct. 2506, 2520, 105 L.Ed.2d 298 (1989), the Court observes that it has "reaffirmed both the general mode of analysis of *Prentis* . . . and its specific holding that ratemaking is an essentially legislative act."

[23] The Due Process Clause of the 14th Amend., U.S.Const., commands that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." For a discussion of the procedural due process guarantees, see Part II, *infra*.

has been applied to individual ratemaking.[24] The early-day English characterization of ratemaking as legislative [25] no longer *defines the essence* of the process in the context of safeguards extended by our Constitution.[26]

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[24] *See, e.g.*, Northwestern Bell Tel. v. Stofferahn, 461 N.W.2d 129, 133 (S.D. 1990) (the court applied *the due process neutrality mandate* in an *individual utility rate case*). In Association of Nat. Advertisers, Inc. v. F.T.C., 627 F.2d 1151 (D.C.Cir. 1979), *cert. denied* 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980), the association sought to prohibit the Federal Trade Commission chairman from participating in pending rulemaking proceedings. Although concluding that the commissioner was not disqualified, the court opined that *the parties in a rulemaking setting "have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker." Id.*, at 1174 (emphasis supplied). *See also* Tennessee Cable TV v. Public Service Com'n, 844 S.W.2d 151, 164-166 (Tenn.App. 1992) (the court applied the neutrality mandate in a general ratemaking case).

[25] There is an analogy between the power of the British Parliament over ratemaking and its divorce jurisdiction of yore. Like ratemaking, divorce *a vinculis lay* within the authority of Parliament, which *also* functioned as a court of law. American legislatures succeeded to the Parliament's power despite their different status in the structure of government. SCHWARTZ, *supra* note 1, § 2.27 at 94. After the U.S. Constitution had established a tripartite division of our national government, the Supreme Court did not reallocate ratemaking to make it coincide more closely with our separation-of-powers doctrine. *See in this connection* Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), where the Court noted that the legislative assemblies of the colonies followed the example of Parliament by treating divorce judicature as within their power. The Court has refused to hold that legislatively pronounced divorces offend our concept of separation of powers. Another function performed by Parliament was chartering of corporations. A company could apply to the Crown for a charter of incorporation *or could incorporate by an act of Parliament.* MAX RADIN, ANGLO-AMERICAN LEGAL HISTORY at 482, 513 n.26 (1936). *No one could today contend with any hope of persuasion that because some function lay within Parliament's yesteryear's prerogative, it must now be placed beyond due process protection.*

[26] In United States v. Brewster, 408 U.S. 501, 508, 92 S.Ct. 2531, 2535, 33 L.Ed.2d 507 (1972), the Court made a similar analysis of the Speech or Debate Clause (Art. I, § 6, U.S.Const.). There,

Neither can this historical label *alone determine* the kind of process that is a *public utility's due today.*[27] *By characterizing the Commission's public utility ratemaking as legislative,* in the sense of *Munn* or *Prentis,* and then stopping its analysis, the court today *arrests* our jurisprudence at its turn-of-the-century stage of development, *ignoring entirely a whole century's growth of due process.*

B. *Ratemaking After The Birth Of Administrative Law*

The administrative process of American law distinguishes between *rulemaking* and *adjudication.* A "rule"

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the Court noted that although the clause's historic roots are in English history, its text must be interpreted, not *against the backdrop of the English system* in which Parliament is not a coordinate branch but the supreme authority ("the highest court in the land"), but rather in light of the American experience as well as in the context of this Nation's *constitutional design. Id.,* 408 U.S. at 508, 92 S.Ct. at 2540.

[27] As Justice Stevens notes in Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 686, 96 S.Ct. 2358, 2368, 49 L.Ed.2d 132 (1976) (Stevens, J., dissenting), when the Court examines "a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a 'legislative' label should not save an otherwise invalid procedure." Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969), similarly teaches *that historical labels do not define the limits of due process protections.* Just because the English tradition militates in favor of dispensing with a hearing does not necessarily render the practice conformable to *our notions of due process.* In Supreme Court of Virginia v. Consumers Union, etc., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), the Court shifted its § 1983 (42 U.S.C. § 1983) immunity focus from the *description of the official*—judge, legislator, executive—to the *functional analysis* of what that official was doing when the harm came to be inflicted. If the legislator was hiring and firing, the immunity was that of an executive; but if a legislator or judge was engaged in lawmaking (or the judge in adjudication), absolute immunity applied. *The same kind of analysis is required by the Court's current constitutional jurisprudence for today's assessment of what process in ratemaking is a public utility's due.* Davis v. Passman, *infra* note 57.

is the product of administrative *legislation*.[28] Rulemaking process[29] is hence the administrative counterpart of legislative lawmaking.[30] In contrast, an "order" is the product of administrative *adjudication*.[31] Adjudicative process is the administrative equivalent of a court's judicature.[32]

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[28] The Oklahoma APA, 75 O.S.Supp.1992 § 250.3(2), defines the term "rule" as:

> "any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedures or practice requirements of the agency. The term 'rule' includes the amendment or revocation of an effective rule but *does not include*:
>
> a. the issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license.
>
> b. the *approval, disapproval or prescription of rates*. For purposes of this subparagraph, the term 'rates' shall not include fees or charges fixed by an agency for services provided by that agency including but not limited to fees charged for licensing, permitting, inspections or publications. * * *" (Emphasis added.)

[29] "Rulemaking" under the APA (Art. I) "means the process employed by an agency for the formulation of a rule. . . ." 75 O.S.Supp.1992 § 250.3(4).

[30] 75 O.S.Supp.1992 § 250.3(2)(b), *supra* note 28.

[31] An "order" is defined by the APA, 75 O.S.Supp.1992 § 250.3(5), as "all or part of a formal or official decision made by an agency including but not limited to the final agency orders." In the 1981 Model State Administrative Procedures Act the word "order" includes every agency action that determines any of the legal rights, duties, privileges, or immunities of an *identified individual or individuals*. For the difference between "rules" and "orders", see Texas County Irr. & Water v. Okl. Water, Okl., 803 P.2d 1119, 1121 (1991).

[32] In individual proceedings an agency deals with adjudicative, not legislative, facts. For the distinction between legislative and adjudicative facts, see State v. Freeman, Okl., 440 P.2d 744 (1968).

> "Facts to which the law is to be applied in the process of adjudication are called *adjudicative facts*. These are *facts 'about the parties'*. They must be ascertained from formal

To implement the U.S. Supreme Court's second-generation constitutional teachings,[33] the Oklahoma APA *explicitly excised from the Art. I rulemaking rubric the process of prescribing rates.*[34] The Model State Administrative Procedures Act [MSAPA] treats ratemaking determinations of *particular applicability*[35] *as orders* subject to the model act's adjudication provisions. Even the

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> proof and are to be distinguished from 'legislative facts', or those which are helpful to a court in determining the meaning, effect, content or validity of enactments. *Legislative facts,* which *are ordinarily general in nature,* may be noticed from official source materials, whether or not they have been formally developed on the record in a judicial proceeding."

Id., 440 P.2d at 757-758 (emphasis added). *Individual ratemaking requires finding facts for application to particular business operations.*

[33] For a discussion of the U.S. Supreme Court's *second-generation* constitutional teachings, see Part II, *infra.*

[34] Oklahoma's APA version presently in force *explicitly* classifies ratemaking as adjudication. The terms of 75 O.S.Supp.1992 § 250.3(2)(b), *supra* note 28, provide in part that the "term 'rule' . . . *does not include*: * * * the *approval, disapproval or prescription of rates.* * * *" (Emphasis added.)

[35] *Adapting* the MSAPA to the mid-twentieth-century metamorphosis imposed by the federal constitutional jurisprudence, the Commissioners on Uniform State Laws took ratemaking out of rulemaking in the 1946, 1961 and 1981 versions of the model act. The 1946 MSAPA version *implicitly* included ratemaking in the definition of "contested case," which was *then* defined as a "proceeding before an agency in which the legal rights, duties, or privileges *of specific parties are required by law or constitutional right to be determined after an agency hearing.*" The 1961 version (adopted with modification in Oklahoma), *specifically* included ratemaking in the definition of "contested case"—i.e., "a proceeding, including but not restricted to ratemaking." The 1981 version *implicitly* includes ratemaking (for a single utility) within the definition of "order"—i.e., "an agency action of *particular applicability* that determines the legal rights . . . of one or more specific persons." In contrast, both the 1961 and 1981 versions define the term "rule" as an agency statement *"of general applicability"* that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency. *See* ARTHUR

federal government—which generally continues to regard ratemaking as rulemaking [36]—has placed *individual ratemaking* into a special category called *on-the-record rulemaking.*[37] This phrase gives recognition to the *new constitutional verity—i.e., that the legislative process of individual ratemaking requires adversarial, trial-type hearings.*[38] *On-the-record rulemaking is now acknowledged*

EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING, § 3.3.1 at 75-76 (1986) (Professor Bonfield served as one of the two reporter-draftsmen for the 1981 MSAPA for the National Conference of Commissioners on Uniform State Laws). At the time of *Prentis* the distinction between *agency ratemaking and agency adjudication* had not yet been crafted. *The changes in the MSAPA give eloquent testimony to the new place individual ratemaking has come to occupy in the post-Prentis administrative remedial regime.*

[36] 5 U.S.C. § 551(4).

[37] 5 U.S.C. §§ 551(4), 553(c). Two types of rulemaking are recognized under the Federal Administrative Procedures Act [FAPA]: *informal* and *formal rulemaking.* 5 U.S.C. §§ 553-557. Informal rulemaking—commonly called notice-and-comment—is governed *only* by the FAPA requirements of notice and opportunity for interested parties to comment or otherwise participate. 5 U.S.C. § 553. *Formal rulemaking takes place when rules must be preceded by a "trial-type" hearing.* 5 U.S.C. §§ 554, 556, 557. A statutory requirement that rules are to be made *on the record after opportunity for an agency hearing* that triggers the process of formal rulemaking—i.e., *rulemaking-upon-a-record.* 5 U.S.C. §§ 556, 557.

[38] Professor Bonfield comments that because some pre-FAPA federal cases treated ratemaking as rulemaking for *certain* purposes, the FAPA classified *all* ratemaking as rulemaking, whether of general or of particular applicability. BONFIELD, *supra* note 35, § 3.3.3(a) at 77-78, citing *Prentis, supra* note 17, 211 U.S. at 226, 29 S.Ct. at 69. Bonfield observes that the FAPA, in combination with the enabling acts of various federal agencies engaged in *individualized ratemaking,* subjected ratemaking of *particular applicability to most of the adjudicative procedures of the FAPA. See, e.g.,* 5 U.S.C. §§ 551(4), 553(c). BONFIELD, § 3.3.3(a) at 77-78. Once a rate is challenged under the federal scheme, the relevant statutes of the federal agencies *require* that the rate be evaluated in a "hearing". *See, e.g.,* (1) Federal Energy Regulatory Commission [FERC], 15 U.S.C. § 717c(e) (1984) (gas pipeline rates) and 16

to be surrounded by a host of due process safeguards.[39]

A recent commentator *captured the essence of ratemaking* in this eloquent distillate: Ratemaking, while legislative in character,[40]

U.S.C. § 824d(e) (electric); (2) Federal Communications Commission [FCC], 47 U.S.C.A. § 204(a) (Cum.Supp.1993); (3) Interstate Commerce Commission [ICC], 49 U.S.C.A. § 10704(a) (railroad) and 49 U.S.C. § 10708(a)(2) (motor carriers); (4) Civil Aeronautics Board [CAB], 49 U.S.C. § 1482(g). The basic format of a rate investigation hearing is that of a traditional adversary hearing. *See, e.g.,* (1) CAB—14 C.F.R. §§ 302.24, .500-.508; (2) FPC—18 C.F.R. §§ 1b.1-.20; (3) FCC—47 C.F.R. § 1.201-.364 (1992). *See generally,* Morgan, *Toward A Revised Strategy For Ratemaking,* 1978 Law Forum 21.

[39] Professor Davis notes that *"for all practical purposes,* rules 'made on the record' *are the equivalent of rules 'made through trial procedure.'"* (Emphasis supplied.) KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE, § 6.3 at 455 (1978). One commentator observes that "an inference that protected objectivity in *some* measure is required [by the FAPA] could be drawn from statutes requiring use of trial-type procedures to a greater or lesser degree." Peter L. Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 Colum.L.Rev. 990, 1048 (1980).

[40] In Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915), Justice Holmes (the author of *Prentis, supra* note 17) explains that "due process" safeguards are *not triggered* when "a rule of conduct applies to *more than a few people* [because] it is impracticable that everyone should have a direct voice in its adoption." (Emphasis added). When "a relatively small number of persons was concerned," Justice Holmes notes, "due process" must be afforded. *Id.* at 142-43. *See also,* Dent v. State of West Virginia, 129 U.S. 114, 124, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889) (legislation comports with due process if, among other things, *"it be general in its operation upon the subjects to which it relates. . . ."*) (Emphasis added). Justice Blackmun, concurring in O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), used the rationale in *Bi-Metallic* and *Dent* to support his conclusion that 180 patients in a nursing home were not deprived of "due process". He also made clear that "the case for *due process protection grows stronger as the identity of the persons affected by the government choice becomes clearer; and the case becomes stronger still as the*

"is normally *particular in applicability* since it involves the fixing of prices to be charged by utilities or carriers. When an agency fixes the rates charged by an electric utility, where there is only one company whose rates are being fixed, the impact on that company is *virtually that of a judicial decision,* and it has a *due process right to be heard.* Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency as opposing parties who can best present their sides in a trial-type format." [41]

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precise nature of the effect on each individual comes more determinately within the decision maker's purview." Id., at 447 U.S. at 800-01, 100 S.Ct. at 2483, quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 at 503-504 (1978) (emphasis added).

[41] SCHWARTZ, *supra* note 1, § 5.8 at 239 (1991) (emphasis added). But SCHWARTZ goes on to say that the same is not true *when rates are general* rather than *particular in applicability. Id.* at 239. Federal courts have noted *the difference* between a *legislative* deprivation that requires no due process and one that is *judicial* which mandates application of the due process safeguards. *See* Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991) ("While a legislative enactment is one adopted *generally for all citizens in a particular classification* [citing as an example *Bi-Metallic, supra* note 40], when a rule adopted for general application *applies only to a small number of persons, its characterization as legislation becomes suspect." Id.,* at 1158, (emphasis added)); County Line Joint Venture v. Grand Prairie, Texas, 839 F.2d 1142 (5th Cir. 1988) ("Conduct of a municipal body is likely to be *deemed legislative when an elected group, such as a city council, makes a general zoning* decision which applies to *a large group of interests.* Conversely, a municipal body's action may be more likely termed *adjudicative if an appointed group such as a zoning board, makes specific decisions regarding a specific piece of property." Id.,* at 1144, (emphasis added)). For the same rationale, see Hoffman v. City of Warwick, 909 F.2d 608, 619-21 (1st Cir. 1990); United States v. LULAC, 793 F.2d 636, 648 (5th Cir. 1986); Buford v. Holladay, 791 F.Supp. 635, 643-44 (S.D. Miss. 1992). Leading commentators also agree that for administrative agencies which possess both legislative and judicial powers, "due process" safeguards are invoked when a small class is affected by the agency action *despite the characterization given to that action*

In sum, rules are agency directives of *general applicability* which are designed *to apply across the board to all regulated entities.* Ratemaking, although historically termed nonadjudicative, generally calls for *particularized applicability and trial-type hearings.* With the post-*Prentis* march of due process, today's *individual ratemaking*—gradually transformed for conformity to the adjudicative process—no longer fits under the *general rubric of lawmaking (or rulemaking).*[42] The present-day acceptance of individual ratemaking as "adjudication" or as "on-the-record rulemaking" is but current recognition—by *both* the federal and state administrative law systems—that ratemaking of particularized applicability has indeed become *sui generis*—a *genre* of legislation that bears procedural characteristics which implicate due process. The essence of business profitability, the extent of capital investment, and the return rate for each utility, are *elements of proof,* all of which call for *a different analysis* and for a different fact finding process (for individual ratemaking) from that of *ordinary* general rulemaking. *It is for this reason that individual ratemaking inquiry*

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by the agency. See R. ROTUNDA & J. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 17.8, pp. 646 (2d Ed. 1992); TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10.7, pp. 667 (2d Ed. 1988).

[42] At the time of *Prentis, supra* note 17, the Court had yet to craft a distinction between administrative *rulemaking* (as lawmaking) and administrative *adjudication.* Citing *Prentis,* Professor Davis notes that in the early 1900's the Court "was unsoundly trying to determine the appropriate procedure" in agency proceedings by characterizing them as either legislative or judicial. DAVIS, *supra* note 39 at 322. He observes that the "move in the thinking of both judges and administrators is away from the idea that adjudication calls for one procedure and that rulemaking calls for another procedure." Courts *"now tend to look to the particular task that an agency is performing in an adjudication or in rulemaking in determining what is the required procedure." Id., at* 324 (emphasis added).

must be surrounded with the full panoply of due process guarantees.[43]

C. *A Self-Caponized Court Rests Its Powerlessness On A Facial Legal Fallacy*

It is plain legal *non sequitur* to say that Commissioner Anthony cannot be disqualified because he is acting in a legislative capacity. The concept of legislative disqualification is intrinsic in our fundamental law. In the context of a legislator's conflict of interest, the terms of Art. 5, § 24, Okl.Const.,[44] mandate that an affected member abstain from voting in any matter, proposed or pending. This constitutional disqualification is judicially enforceable.[45] A legislator found to be disqualified within the meaning of § 24 could be compelled to desist from voting. *An elected executive official sitting as a legislative decisionmaker in an individual ratemaking proceeding*

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[43] In United States v. Florida East Coast Railway Co., 410 U.S. 224, 245, 93 S.Ct. 810, 821, 35 L.Ed.2d 223 (1973), an Interstate Commerce Commission ratemaking case, the Court held that when agency action is directed at "a very small number of persons [who are] exceptionally affected," it constitutes adjudication and due process attaches, but when the same agency action is "applicable across the board" to all utility companies it is rulemaking in its purest form with no due process implications. *Id. See also,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978); SCHWARTZ, *supra* note 1, § 5.9, at 241-242.

[44] The terms of Art. 5, § 24, Okl.Const., are:

> "A member of the Legislature, who has a personal or private interest in any measure or bill, proposed or pending before the Legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon."

[45] Although there is no Oklahoma authority construing Art. 5, § 24, Okl.Const., it is apparent from the jurisprudence of other states (with similar or virtually identical provisions) that this constitutional mandate is judicially enforceable. *See, e.g.,* Kremer v. Barbieri, 411 A.2d 558, 561 (Pa. 1980); Opinion of the Justices No. 317, 474 So.2d 700, 702 (Ala. 1985).

should be no less vulnerable to disqualification than his counterpart in the legislature when the latter is found to have a conflict of interest.

II

TODAY'S PRONOUNCEMENT CONTRAVENES STATE AND FEDERAL DUE PROCESS NORMS BY WITHDRAWING FROM THE COMMISSION'S INDIVIDUAL RATEMAKING AN ESSENTIAL ELEMENT OF DUE PROCESS—THAT OF A NEUTRAL AND DETACHED DECISIONMAKER

A. *Both Legislative And Executive Functions Are In Some Aspects Governed By Various Forms Of Due Process*

This Nation's constitutional jurisprudence teaches that, when the State seeks to affect a *protected liberty or property interest,* due process *applies not just in courts but to the other functions of government* as well.[46]

(1). *The Executive Department.* A prisoner has a due process right to "an adversary executive hearing" before revocation of parole [47] or probation,[48] rescission of "good-time credits" [49] and before an involuntary transfer to a

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[46] In Mooney v. Holohan, 294 U.S. 103, 113, 55 S.Ct. 340, 342, 79 L.Ed.2d 791 (1935), the Court observes that the 14th Amendment *"governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers."* (Emphasis supplied.)

[47] Once a state grants a prisoner conditional liberty dependent on the observance of special parole restrictions, due process protections attach in proceedings to revoke that liberty interest. Morrissey v. Brewer, 408 U.S. 471, 487-489, 92 S.Ct. 2593, 2603-2604, 33 L.Ed.2d 484 (1972).

[48] Gagnon v. Scarpelli, 411 U.S. 778, 791, 93 S.Ct. 1756, 1764, 36 L.Ed.2d 656 (1973).

[49] Wolff v. McDonnell, 418 U.S. 539, 554, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935 (1974); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); Ponte v. Real, 471 U.S. 491, 498-499, 105 S.Ct. 2192, 2197, 85 L.Ed.2d 553 (1985).

state mental hospital.[50] Due process also attaches in other areas of governmental regulation: food stamp reductions;[51] termination of welfare benefits;[52] exclusion of a permanent resident alien who is attempting to reenter the United States;[53] a public job termination;[54] and license revocation.[55] The due process guarantee may be violated by unfairness or corruption of officers in the performance of administrative functions.[56]

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[50] Vitek v. Jones, 445 U.S. 480, 487-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980).

[51] Atkins v. Parker, 472 U.S. 115, 128, 105 S.Ct. 2520, 2528, 86 L.Ed.2d 81 (1985).

[52] Goldberg v. Kelly, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970).

[53] Landon v. Plasencia, 459 U.S. 21, 34, 103 S.Ct. 321, 330, 74 L.Ed.2d 21 (1982).

[54] Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) (the due process challenges of discharged Central Intelligence Agency employee are reviewable).

[55] In Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), the Court upheld the lower court's finding that members of the state optometry board had sufficient pecuniary interest in reducing competition to disqualify them from participating in the license revocation hearings. The Court held that an optician licensing board whose members were drawn wholly from one wing (self-employed practitioners) of the occupation could not itself adjudicate unprofessional conduct charges brought against the other wing (commercially or non-self-employed practitioners). The Court based this holding on the premise that the monetary gain to the self-employed practitioners would unfairly infect their decisional processes.

[56] Norris v. State of Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074 (1935); *Mooney, supra* note 46, 294 U.S. at 112-113, 55 S.Ct. at 341-342. The Court has recognized that administrative officers, when executing the provisions of a statute dealing with the liberty of persons, have no right to disregard the fundamental principles that inhere in due process of law. Kaoru Yamataya v. Fisher, 189 U.S. 86, 99-100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903).

(2). *The Legislative Department.* Legislative action is not beyond the reach of due process if the implicated interests mandate that certain safeguards be accorded. The anti-discrimination component of the 5th Amendment applies to a congressman's hiring and firing practices.[57] Due process has also found its way into congressional hearings where the Congress or a state legislature attempts to hold one of its members in contempt and to certify that member for trial in the courts.[58]

B. *The Due Process Mandate For Neutral Decisionmakers Governs A Host Of Proceedings Before The Executive And Legislative Organs of Government*

Due process of law fundamentally requires a fair hearing before a fair tribunal.[59] Fairness against governmen-

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[57] Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). *Davis* teaches that the Due Process Clause of the 5th Amendment gives congressional employees the right to be free from official discrimination. The Court held that a woman discharged from employment by a congressman because of her gender has standing to bring an action against him.

[58] Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966) (the Georgia House of Representatives acted unconstitutionally when it excluded Julian Bond because of his statements criticizing the federal government's policy in Vietnam); Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (the U.S. House of Representatives acted unconstitutionally when it effectively expelled Adam Clayton Powell by a majority vote because of charges that he had misappropriated public funds and abused the process of the New York courts). *See also* Miller v. Town of Hull, Mass., 878 F.2d 523 (1st Cir. 1989) (the town board of selectmen violated the due process rights of members of the town redevelopment authority by removing them because of a position they took with respect to a housing project for the elderly); Kucinich v. Forbes, 432 F.Supp. 1101 (N.D.Ohio 1977) (Councilman Kucinich had been punished for the exercise of his right of free speech when the Cleveland City Council suspended him on the charge that he had slandered the council president in a statement on the floor of that body).

[59] For the pertinent terms of the Due Process Clause of the 14th Amend., U.S.Const., see *supra* note 23. No matter how complete

tal deprivation of an individual's property or liberty interest is ensured by procedural safeguards [60] when proper notice and opportunity to be heard are afforded.[61] *One*

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the panoply of procedural devices which protect a particular liberty or property interest, due process requires that those procedures be neutrally applied. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors." M. H. Redish and L. C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 483 (1986).

[60] Due process includes several procedural guarantees: (1) adequate notice of the charges or basis for government action; (2) a neutral decisionmaker; (3) an opportunity to make an oral presentation to the decisionmaker; (4) an opportunity to present evidence or witnesses to the decisionmaker; (5) a chance to confront and cross examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decisionmaker; and (7) a decision based on the record with a statement of reasons for the decision. Additionally, there are six other procedural safeguards which tend to appear only in connection with criminal trials or formal judicial process of some type. Those are: (1) the right to compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial; and (6) a burden of proof on the government greater than a preponderance of the evidence standard. *See* ROTUNDA & NOWAK, *supra* note 41, § 17.8, at pp. 644-45; Henry J. Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267, 1279-1292 (1975).

[61] *Goldberg, supra* note 52. Our due process clause, Art. 2, § 7, Okl.Const., has a definitional sweep that is co-extensive with its federal counterpart. The terms of Art. 2, § 7, Okl.Const., are: "No person shall be deprived of life, liberty, or property, without due process of law." Messenger v. Messenger, Okl., 827 P.2d 865, 872 (1992); Fair Sch. Finance Coun. of Okla. v. State, Okl., 746 P.2d 1135, 1148 n.48 (1987); Matter of Rich, Okl., 604 P.2d 1248, 1250-

of the integral elements of due process is an individual's right to be heard by a neutral and detached decisionmaker.[62] *That element is not constitutionally reserved for exclusive application to adjudicative proceedings. The neutrality mandate extends not only to judges but also to agency decisionmakers.*[63] The neutral examiner concept

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1251 (1979); McKeever Drilling Co. v. Egbert, 170 Okl. 259, 40 P.2d 32, 35 (1935). *See* Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972), citing Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531 (1864), and Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

[62] Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927), arose out of a conviction in a mayor's court for violation of state prohibition laws. In addition to his regular income. the mayor-judge shared in the fees and costs levied against convicted violators. The Court held that due process is violated when a decision is made by "a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against" the defendant. Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972), dealt with traffic convictions in a mayor's court. The mayor-judge was responsible for village finances; and the mayor's court, through fines, forfeitures, costs and fees, supplied a major part of the village's revenue. The system was challenged because it denied the defendant a trial before a disinterested and impartial judicial officer, contrary to the guarantee of due process.

[63] *Administrative decisionmakers must be as neutral and detached as a judge is called upon to be by the applicable standards of federal due process.* In *Gibson, supra* note 55, 411 U.S. at 579, 93 S.Ct. at 1698, the Court states:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio [*supra*, note 62] . . . . And Ward v. Village of Monroeville [*supra* note 62], indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '[*m*]*ost of the law concerning disqualification* because of interest *applies with equal force to . . . administrative adjudicators.*' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." (Emphasis added.)

Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). In Friedman v. Rogers, 440 U.S. 1, 18, 99 S.Ct. 887,

is deeply engrained in Anglo-American jurisprudence. It came into the fabric of our fundamental law long before the Warren era [64] and has been consistently enforced *sans* aberrational departure.[65] Due process, which is a flexible concept calling for such procedural protection as the particular situation demands, is fashioned first by considering what private interest is to be affected by the agency action and then by what protection must be accorded that interest.[66] An agency decisionmaker sitting in an ad-

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898, 59 L.Ed.2d 100 (1979), the Court notes that Rogers, an optometrist, has "a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board [of Optometry]." *Id.*, citing *Gibson, supra* note 55. Due process will be applied before the Corporation Commission. Agencies not governed by the APA's Art. II adjudicative process, 75 O.S.1991 §§ 309 et seq., are nonetheless bound by those portions of that Article which embrace due process concepts. C.F. Braun & Co. v. Corporation Commission, Okl., 609 P.2d 1268, 1273-1274 (1980); Teleco, Inc. v. Corporation Com'n, Okl., 653 P.2d 209, 214 (1982); Harry R. Carlile Trust v. Cotton Petroleum, Okl., 732 P.2d 438, 442-443 n. 21 (1987); Amoco Production v. Corp. Com'n of Okl., Okl.App., 751 P.2d 203, 207 (1986); State ex rel. Henry v. Southwestern Bell, Okl., 825 P.2d 1305, 1317 (1992); Lincoln Bank and Trust v. Tax Com'n, Okl., 827 P.2d 1314, 1319 (1992); *see also* Art. 9, § 19, Okl.Const.; Monson v. State ex rel. Okl. Corp. Com'n, Okl., 673 P.2d 839, 842 (1983).

[64] *Tumey, supra* note 62.

[65] *Ward, supra* note 62; Coolidge v. New Hampshire, 403 U.S. 443, 449-453, 92 S.Ct. 2022, 29 L.Ed.2d 564 (1971), teaches that the neutrality element of due process is as applicable to adjudication by a nonjudicial tribunal as it is to the adjudicative process of a court. *Coolidge* required a neutral person for a *nonadversarial ex parte proceeding to issue a search warrant.* The New Hampshire attorney general was not considered a neutral and detached officer *for this purpose.*

[66] *Due process protects liberty and property interests regardless of which governmental official seeks to affect is adversely. Morrissey, supra* note 47, 408 U.S. at 481, 92 S.Ct. at 2600; Mitchell v. W.T. Grant Company, 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406 (1974); Schweiker v. McClure, 456 U.S. 188, 195, 102 S.Ct. 1665, 1670, 72 L.Ed.2d 1 (1982).

versarial contest may neither (1) have a personal financial interest or be a direct competitor[67] with a person who stands before the tribunal or (2) have been the target of abuse or harsh criticism from such a person.[68]

The due process neutrality mandate has been imposed on execuitve agency action which affects (1) welfare recipients;[69] (2) the involuntary transfer of a prisoner to a mental hospital;[70] (3) the revocation of probation;[71]

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[67] In *Friedman, supra* note 63, 440 U.S. at 17-20, 99 S.Ct. at 898-99, the Court made clear that in professional disciplinary proceedings a person has a right to a fair and impartial hearing board; *Gibson, supra* note 55 at 1698; *Ward, supra* note 62; *Tumey, supra* note 62.

[68] Taylor v. Hayes, 418 U.S. 488, 501-03, 94 S.Ct. 2697, 2704-06, 41 L.Ed.2d 897 (1974); Pickering v. Board of Education, 391 U.S. 563, 578-79 n. 2, 88 S.Ct. 1731, 1740 n.2, 20 L.Ed.2d 811 (1968). Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S.Ct. 499, 505, 27 L.Ed.2d 532 (1971), teaches more eloquently than any other case *that even an offending or abusive litigant does not lose the constitutional claim to a neutral decisionmaker.* There, the Court observed that "[n]o one so cruelly slandered [as the presiding judge] is likely to maintain that calm detachment necessary for fair adjudication". *Id.*

[69] *Goldberg, supra* note 52. In *Goldberg* the Court held that welfare recipients were entitled to full evidentiary hearings before their rights to federal funds could be terminated. Although the recipients' main concern was to establish a procedural right to a full evidentiary hearing, the court noted that *within that right was a right to a fair and impartial decisionmaker. Id.*, 397 U.S. at 271, 90 S.Ct. at 1022.

[70] In *Vitek, supra* note 50, the Court held that an involuntary transfer of a prisoner to a mental hospital implicated a protected liberty interest and that *due process was not satisfied* by the mere certification of the need for such treatment by a state-designated physician. The Court found that the transfer constituted a deprivation of liberty both because state statutes at issue gave rise to a legitimate expectation on the part of the prisoner. The Court reiterated that due process required (1) notice, (2) time for the prisoner to prepare his argument, (3) a hearing where the prisoner has the opportunity to be heard in person, to present evidence and

(4) the revocation of a convict's "good time" credits;[72] and (5) the revocation of parole.[73] *Although each situation calls for differing levels of due process protection and scrutiny, the neutrality strand is present in all of these instances.* The command also extends to *legislative decisionmakers.* A legislative enactment cannot meet the standards of neutrality when its terms authorize a narrow and biased segment of the community to decide certain zoning permits.[74]

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witnesses, and to cross examine state witnesses; (4) *an independent decisionmaker,* and (5) *a written statement by the decisionmaker.*

[71] In *Gagnon, supra* note 48, the Court held that because probation revocation (like parole revocation) does result in a loss of liberty, a probationer (like a parolee) is entitled to a preliminary and a final revocation hearing, *under the conditions specified in Morrissey* (*supra* note 47). *Id.*, 411 U.S. at 782. 93 S.Ct. at 1760.

[72] *Wolff, supra* note 49. In *Wolff* an inmate sought the restoration of "good time" credits. The Court recognized that "prison disciplinary proceedings are not part of a criminal prosecution, and the *full panoply of rights due a defendant in such proceedings does not apply.*" *Id.*, 418 U.S. at 556, 94 S.Ct. at 2975. *But the Court opined that several due process safeguards, including the right to an impartial committee to decide disciplinary matters, i.e., revocation of "good time" credits, did apply. Id.*, 418 U.S. at 571, 94 S.Ct. at 2982.

[73] *Morrissey, supra* note 47. In *Morrissey* the Court held that an individual released from prison on parole need not receive the "full panoply" of due process safeguards, but was entitled to some of these protections including the right to have his revocation hearing conducted by someone other than the parole officer that makes the recommendation for revoking his parole. *Among the minimum due process requirements which is the parolee's due, the Court opined, is "a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers". Id.*, 408 U.S. at 489, 92 S. Ct. at 2604.

[74] In Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), the Court struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of owners of two-thirds of the property within 400 feet

Ratemaking for application to a *single* public utility calls for adversary hearings and for application of contested adjudicative facts to the governing norms of statutory and constitutional law. *These attributes combine to clothe this form of ratemaking with characteristics to which the federal constitution attaches due process protections. The safeguards include the right to neutral decisionmakers.* To withdraw them from public utilities would clearly contravene federal due process.

C. *Southwestern Bell Telephone Company Has A Federal Constitutional Claim To A Neutral And Detached Tribunal*

Petitioner Southwestern Bell Telephone Company seeks this court's command that would disqualify Commissioner Anthony from sitting in Corporation Commission proceeding PUD-260 [75] as well as in *all* pending and future SWB cases. SWB asserts that Commissioner Anthony's public statement of October 2, 1992,[76] considered

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of the proposed facility. *See* Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). In *Washington* and *Eubank*, *supra*, a limited number of people, with obvious biases against devaluation of their individual properties, were authorized by legislation to make determinations for individuals regarding zoning. *A judge who has a financial position adverse to a party before the tribunal is in the same ineligibility category as the unauthorized lawmakers in the cited cases. See also,* R. ROTUNDA & NOWAK, *supra* note 41, § 17.8 at 658.

[75] PUD-260, a utility rate-setting proceeding, had begun below as an investigation by the director of the agency's public utility division into the effect of the federal Tax Reform Act of 1986 upon Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and the cause was remanded for further proceedings. *Henry, supra* note 63. *The present controversy over Commissioner Anthony's disqualification arose after the earlier remand.*

[76] According to his public announcement on file herein, in which he conceded making ex parte statements to certain officials of SWB, he had been serving for nearly four years as informant and inves-

together with a motion he filed in the case to compel SWB to produce certain notes and documents,[77] make

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tigator of federal-law violations ascribed to certain Commission-regulated utilities. Commissioner Anthony made the following statement on October 2, 1992.

> "As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.
>
> As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner in 1989, individuals associated with regulated companies have offered me cash or inducements.
>
> With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.
>
> Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.
>
> I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse consequence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

[77] The notes sought by Commissioner Anthony's motion *relate to conversations he had with a SWB senior corporate officer and SWB senior corporate lawyer about the conduct of persons asso-*

him ineligible to sit in an individual ratemaking case as a neutral decisionmaker.

Commissioner Anthony's participation in this rate case is constitutionally impermissible for two reasons: (a) he had several ex parte conversations with different representatives of SWB and *most importantly* (b) one who in the same case or in interconnected matters assists in the prosecution of company officials cannot act as a neutral decisionmaker in a related individual ratemaking case.[78] Because the principle of impartiality that governs the *cold neutrality and detachment* of judges must be applied with equal force to decisionmakers in individual ratemaking proceedings,[79] I would declare today that Commissioner Anthony is disqualified in PUD-260 and that his lack of detachment calls for his replacement by the command of federal fundamental law (Part III, *infra*) or in the alternative under the mandate of the state statutory law (Part IV, *infra*). I would also hold that Anthony's disqualification applies solely to this case and should not affect the

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ciated with their firm, which is believed to be *pertinent to the rate case at hand (PUD-260).*

[78] *Northwestern Bell Tel., supra* note 24, 461 N.W.2d at 133 (where the court applied *the due process neutrality mandate* in an individual utility rate case); *see also* State ex rel. Okl. Bar Ass'n v. McNaughton, Okl., 719 P.2d 1279, 1281 (1986) (a lawyer was publicly reprimanded for improperly accepting representation of an adult defendant charged with lewd molestation of a minor and also serving as counsel for the underage victim, her minor sister and their mother in matters connected with his client's prosecution); Tweedy v. Oklahoma Bar Ass'n, Okl., 624 P.2d 1049, 1053 (1981); Adan Haji Jama v. The King, Judicial Committee of the Privy Council (1948) (reported in M. MERRILL, CASES AND MATERIALS ON ADMINISTRATIVE LAW, Vol. 1, p. 173 (1950).

[79] *Gibson, supra* note 55; *Friedman, supra* note 63. There can be no legal basis for withholding from individual utility ratemaking hearings the Due Process Clause's protection conferred by *Gibson, supra* note 55. The *Gibson* teachings apply *with the same force to adversary individual utility ratemaking hearings as they do to any run-of-the-mill adjudications.*

post-decisional proceedings authorized by this court's February 9, 1993 order in *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission.*[80] That case, unlike PUD-260, has been decided and is now on appeal. I would save for another day the questions (1) whether today's challenge would also disqualify Anthony from participating *in any other pending or future cases in which SWB may be interested or a party* and (2) whether an evidentiary proceeding might be required to determine Anthony's disqualification in utility-rate cases other than PUD-260.

III

WHEN A COMMISSIONER VOLUNTARILY RECUSES OR IS COMMANDED TO DISQUALIFY *IN AN INDIVIDUAL RATEMAKING PROCEEDING*, FEDERAL FUNDAMENTAL LAW COMMANDS THIS COURT TO PLACE THE COMMISSION UNDER THE APA REPLACEMENT MECHANISM

The Corporation Commission consists of three commissioners who have the exclusive authority to regulate public service corporations.[81] The concurrence of two commissioners is required to decide any question.[82] Even

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[80] Southwestern Bell Telephone Company v. Oklahoma Corporation Commission, No. 80,333 (consolidated with Nos. 80,334, 80,340, 80,342 and 80,345). In that appeal we afforded SWB the opportunity (a) to elicit below *after-acquired evidence*, if any there be, that would tend to show Commissioner Anthony was disqualified at the time he sat as a decision-maker in PUD-662, a case different from PUD-260, and (b) to supplement the record in this court by including in it a transcript of the disqualification proceedings to be conducted pursuant to the authority conferred by our order.

[81] Art. 9, § 15, *infra* note 115, and § 18a, *infra* note 82, Okl. Const.

[82] The terms of Art. 9, § 18a, Okl.Const., are:

> "* * * A majority of said Commission shall constitute a quorum, and the concurrence of the majority of said Commission shall be necessary to decide any question."

though the State Constitution allows the Commission to sit with a quorum of two commissioners,[83] to do so in a complex rate case might be inefficient because in the event of a tie vote proceedings would be unduly prolonged.

Oklahoma jurisprudence does not afford a mechanism for breaking a tie when the Corporation Commission decisionmakers are evenly divided. In original proceedings brought here over the last decade this court has *twice* come to grips with quests for the recusal of a Corporation Commission member.[84] In *ETSI* [85] the court disqualified Commissioner Townsend, declaring that members of an agency sitting in an adjudicative capacity must meet the criteria of neutral and detached decisionmakers. In *Cooperative Ginners'* the court assumed original jurisdiction but refused to disqualify Commissioners Anthony and Watts.[86] Neither *ETSI* nor *Cooperative Ginners'* was an *individual ratemaking case.*

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[83] Art. 9, § 18a, Okl.Const., *supra* note 82.

[84] ETSI Pipeline et al v. Townsend, Sup.Ct. No. 58,707 (original jurisdiction assumed and writ granted *by unpublished order* of September 9, 1982) and Cooperative Ginners' Association of Oklahoma et al v. Anthony and Watts, Sup. Ct. No. 78,510 (original jurisdiction assumed and writ of mandamus denied *by unpublished order* of January 28, 1992).

[85] *ETSI, supra* note 84. The September 9, 1982 order states:

> "Writ granted directing the Honorable James Townsend, member of the Corporation Commission, respondent herein, to certify his recusal in Cause No. 27470, on the docket of the Corporation Commission, and to forward a certified copy thereof to the Governor of the State of Oklahoma. *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 [1973]."

No mention is made of Townsend's recusal in the published decision of the case in which he was disqualified. Missouri-Kansas-Texas Railroad Co. v. State, Okl., 712 P.2d 40 (1986). *After Commissioner Townsend had been disqualified by an order of this court, the Governor either declined or was never asked to fill the vacancy by a pro hac vice appointment. ETSI* was decided by the concurrence of two elected commissioners who sat in the case.

[86] The *unpublished order* in *Cooperative Ginners', supra* note 84, states: "Original jurisdiction is assumed. Application for writ of mandamus requiring Commissioners Bob Anthony and J.C. Watts,

The Rule of Necessity

If the law—either state or federal—were bereft of mechanism for replacing a disqualified Corporation Commissioner, a "rule of necessity" [87] would permit the challenged agency member to sit in the case. There is no need *in this case* to invoke the common-law rule of necessity because federal fundamental law affords an effective post-recusal mechanism for replacing a disqualified Commissioner.

The Commission's individual ratemaking proceedings [88] and those conducted by the APA-governed agencies [89] comprise but a single class which is entitled to equal procedural treatment. Today's holding—which regards the Commission's public utility ratemaking as legislative, but leaves the same proceedings before APA-governed agencies with all the safeguards of adjudication process—creates a constitutionally impermissible adjective-law

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Jr., to recuse is denied. * * *" There, I joined in *not* disqualifying Commissioners Anthony and Watts. It was *then* my opinion that the "rule of necessity", *infra* note 87, was applicable to Corporation Commission members. *Id.* (Opala, C.J. dissenting from order of January 28, 1992). Since then I have changed my position, now taking the view articulated today in Parts III and IV of this opinion that the law *does indeed provide a mechanism for replacing a disqualified commissioner.*

[87] The rule of necessity rests on a well-established common-law principle *that, regardless of bias, judges have a duty to sit if they alone have the power to decide the matter before them.* United States v. Will, 449 U.S. 200, 214-216, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980). *Where a mechanism is in existence for replacing a disqualified tribunal member, the successfully challenged decision-maker must step aside.* Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936).

[88] The Commission is exempted from compliance with the Art. II adjudicative process by 75 O.S.Supp. 1993 § 250.4(B)(4), but is required to comply with some portions of the APA's Art. I rulemaking provisions. 75 O.S.Supp. 1993 § 250.4(A)(2).

[89] For the definition of an APA-governed agency, see *supra* note 8.

dichotomy.[90] *Procedure for individual ratemaking cases before the Commission and that for the identical function exercised by an APA-governed agency must be the same.* The *post-recusal replacement mechanism* must also be the same. The command for procedural uniformity comes both from the state[91] and federal fundamental law.[92] *Groppi v. Wisconsin*[93] teaches that *conformity to con-*

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[90] Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 762-763, 15 L.Ed.2d 620 (1966), which teaches that when the state singles out some litigants for a less advantageous remedial treatment than that which is afforded others in like proceedings, equal protection is violated unless the distinction bears a rational nexus to some legitimate state goal. Humphrey v. Cady, 405 U.S. 504, 508-512, 92 S.Ct. 1048, 1051-1054, 31 L.Ed.2d 394 (1972); Foucha v. Louisiana, 504 U.S. ——, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992); Cascio v. State ex rel. Dept. of Pub. Safety, Okl., 686 P.2d 282, 284 (1984).

[91] *See* discussion of the uniformity-of-procedure mandate of Art. 5, 46 Okl.Const., in Part III(B), *infra.*

[92] *See* the discussion of the federal constitution's equal protection commands in Part III(A), *infra.*

[93] 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971). Groppi was a Catholic priest who was charged with resisting arrest. When he was brought to trial he objected to venue on constitutional grounds. The state court ruled that it was powerless to change the trial's venue since state law prevented a change of venue in misdemeanor cases. The U.S. Supreme Court held the state law unconstitutional since it denied the defendant the opportunity to obtain a change of venue when necessary for a fair trial. Faced with a similar constitutional challenge to Nebraska's venue law in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Court, citing *Groppi, supra,* observed "that state laws restricting venue must on occasion *yield to the constitutional requirement* that the State afford a fair trial." *Id.,* 427 U.S. at 563, 96 S.Ct. at 2805 n. 7 (emphasis added). *See also* Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), where an indigent defendant sought a free transcript in order to perfect his appeal. The Illinois Supreme Court rejected his request because a state court rule provided indigents with transcripts only in felony cases. The U.S. Supreme Court held the rule unconstitutional, stating that the "distinction

stitutional procedure is compellable even when there is a lack of authorizing provisions in state law. In *Groppi* the Court held unconstitutional a state law which *permitted a change of venue for felony but not for misdemeanor trials.* When state law does not provide the authority necessary to carry out federal constitutional commands resort may be had to the U.S. Constitution to accomplish the constitutionally mandated objective. Just as the Commission, though not an Art. II APA-governed agency,[94] must conform its inquiries to due process standards,[95] so also must its individual ratemaking proceedings be governed by compliance with equal protection. I would hence hold, for reasons to be explained in Part III, *infra*, that *when a commissioner voluntarily recuses or is commanded to disqualify, state and federal fundamental law authorizes this court to place the Commission pro tanto under the APA's (Art. II) §316 replacement mechanism.*[96]

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between felony and nonfelony offenses drawn by Rule 607(b) [an Illinois State rule] can no more satisfy the requirements of the Fourteenth Amendment than could the like distinction in the Wisconsin law, held invalid in *Groppi* . . . . The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case." *Id.*, 400 U.S. at 195-196, 92 S.Ct. at 415.

[94] For definition of an Art. II APA-governed agency, see *supra* note 8.

[95] *Braun, supra* note 63, 609 P.2d at 1273-1274; *Cotton Petroleum, supra* note 63, 732 P.2d at 442-443; *Amoco, supra* note 63, 751 P.2d at 207; *Henry, supra* note 63, 825 P.2d at 1317; *Lincoln, supra* note 63, 827 P.2d at 1319.

[96] The pertinent terms of 75 O.S.1991 § 316, are:

> "A hearing examiner or agency member shall withdraw from any individual proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impar-

A. *The Equal Protection Clause's Mandate For A Uniform Post-Recusal Replacement Mechanism*

This court has a duty to obey the Federal Constitution's equal protection mandate [97] for a uniform procedure [98] and provide a post-recusal replacement mechanism. Although states are free to enlarge the basic freedoms guaranteed by the federal constitution,[99] they

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tial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. *Upon the disqualification of a member of an agency, the Governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding.* In further action, after the disqualification of a member of an agency, the provisions of Section 11 of this act [§ 311] shall apply." (Emphasis added.)

[97] The Equal Protection Clause of the 14th Amend., § 1, U.S. Const., commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 U.S. ——, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992).

[98] *Baxstrom, supra* note 90, 383 U.S. at 111, 86 S.Ct. at 762-763; *Humphrey, supra* note 90, 405 U.S. at 508-512, 92 S.Ct. at 1051-1053; *Foucha, supra* note 90, 504 U.S. at ——, 112 S.Ct. at 1785; *Cascio, supra* note 90, 686 P.2d at 284.

[99] U.S. Supreme Court jurisprudence is not dispositive of rights guaranteed by state constitutional provisions. States are free to interpret their own due process and equal protection clauses to afford safeguards beyond those granted by the federal constitution, even when the state and federal constitutions are similarly or identically phrased. *See* Michigan v. Long, 463 U.S. 1032, 1037-1042, 103 S.Ct. 3469, 3474-3477, 77 L.Ed.2d 1201, 1212-1215 (1983); Cooper v. State of California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967); Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *see also Messenger, supra* note 61, 827 P.2d at 873 n.42; *Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1147 n.46; Turner v. City of Lawton, Okl., 733 P.2d 375, 380 (1987). *See generally* Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489, 499 (1977); ROTUNDA & NOWAK, *supra* note 41, § 1.6(c) at 31-32.

may not create artificial boundaries for individual ratemaking hearings that fall within an identical class. To meet equal protection standards *all* persons need not receive identical treatment, but the *distinctive features of a classification must have some relevance to the purpose for which it has been created.*[100] *A classification is not to be measured by whether it discriminates, but rather by whether it discriminates impermissibly or invidiously* [101] —i.e., whether the difference in treatment between the legislative and adjudicative ratesetting remedies *rationally* furthers a legitimate state interest.[102] *The Commission's individual ratemaking proceedings* [103] *and those conducted by the agencies governed by Art. II of the APA* [104] *comprise but a single class which is entitled to absolutely equal procedural treatment.*

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[100] The Equal Protection Clause is violated *when some but not all regulated businesses* in an entire class are excluded from protection of the adjudication safeguards afforded by the APA. *Baxstrom, supra* note 90; *Cady, supra* note 90, *Cascio, supra* note 90; Wilson v. Foster, Okl., 595 P.2d 1329, 1332 (1979).

[101] *See, e.g., Cascio, supra* note 90, 686 P.2d at 284; Texas Oklahoma Exp. v. Sorenson, Okl., 652 P.2d 285, 291 (1982).

[102] "[U]nless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categories on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification *rationally further* a legitimate state interest." *Nordlinger, supra* note 97, 505 U.S. at ——, 112 S.Ct. at 2331-2332 (emphasis added), citing City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-441, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313 (1985), and New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

[103] The Commission is expressly excluded from compliance with the APA (Art. II) hearing provisions. 75 O.S.Supp. 1993 § 250.4 (B)(4).

[104] Art. II APA-governed agencies (*supra* note 8) have the authority to set rates in individual proceedings. *See, e.g.*, the State Board for Property and Casualty Rates (36 O.S. 1991 §§ 341.1, 900.1 et seq.; State v. Okl. State Bd. For Property, Okl., 731 P.2d 394 (1987)).

The goal of ratemaking—whether it be by an Art. II APA-governed agency [105] or by the Commission—is to give the affected parties a fair return upon the fair value of dedicated property. When the ratemaking decision is apt to affect *particular* rights and obligations, the Art. II adjudicative process affords those who are to be affected the right to a trial-type hearing with the safeguards of procedural due process.[106] Because the very same goal that applies to agency ratemaking also governs public utility ratemaking by the Commission, I find *no rational* basis for creating a different and less protective procedural classification for *particularized ratemaking before the Commission.*[107] Section 316 of the APA (Art. II) explicitly provides that upon the disqualification of an APA-governed agency member, the Governor shall immediately appoint a "member pro tem[pore] to sit in place of the disqualified member in that proceeding." [108] *Oklahoma cannot, without violating the Equal Protection Clause,*

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[105] APA-governed agency ratemaking, which is explicitly excluded from Art. I rulemaking process by 75 O.S.Supp. 1992 § 250.3(2)(b) (*supra* note 28), is governed by the Art. II adjudicative process (75 O.S.1991 §§ 309 et seq.).

[106] The same due process protections are afforded under the federal administrative system. American Airlines v. Civil Aeronautics Board, 359 F.2d 624, 631 (D.C.Cir. 1966), *cert. denied,* 385 U.S. 843, 87 S.Ct. 73 (1966), *teaches that if the administrative process is directed at particular persons—even if it be termed rulemaking—the persons to be affected must be given the* same hearing rights as in proceedings that are clearly of an adjudicative nature.

[107] For the Equal Protection Clause of the 14th Amend., § 1, U.S.Const., see *supra* note 97. The Oklahoma Constitution does not have an equal protection clause similar to that found in its federal counterpart, but this court has identified a functional equivalent of that clause in the anti-discrimination component of our State Constitution's due process section. Art. 2, § 7, Okl.Const. ("No person shall be deprived of life, liberty, or property, without due process of law."). *See Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1148 n.48.

[108] For the pertinent terms of 75 O.S.1991 § 316, see *supra* note 96.

withdraw today from public utility ratemaking those essential characteristics of due process—i.e., a decision-maker's neutrality [109]*—which attach to ratemaking before the APA-governed agencies. I would hence hold that by the command of the Federal Constitution's Equal Protection Clause the § 316 provisions of the APA's Art. II replacement mechanism for a disqualified agency member apply to public utility ratemaking before the Commission.*

B. *The Uniformity-Of-Procedure Mandate of Art. 5, § 46, Okl.Const., Requires That Individual Ratemaking Procedure In The APA-governed Agencies And Before The Commission Not Be Materially Different*

Art. 5, § 46, Okl.Const.,[110] prohibits the passage of local or special laws regulating judicial proceedings or inquiry before the courts, commissioners *or other tribunals.*[111] Today's pronouncement violates that section.

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[109] *Gibson, supra* note 55, 411 U.S. at 579, 93 S.Ct. at 1698, and its progeny.

[110] The pertinent terms of Art. 5, § 46, Okl.Const., are:

"The Legislature shall not . . . pass any . . . special law . . .

* * *

Regulating the *practice* . . . in judicial proceeding or inquiry before the courts . . . or *other tribunals.*" (Emphasis added).

[111] Maule v. Independent School Dist. No. 9, Okl., 714 P.2d 198, 203-204 (1986); Reynolds v. Porter, Okl., 760 P.2d 816, 822 (1988); Great Plains Federal S & L v. Dabney, Okl., 846 P.2d 1088, 1095-1096 (1993) (Opala, J., concurring). The word "tribunal," as used in § 46, includes every agency that sits in an adjudicative capacity. Our fundamental law explicitly charges the Corporation Commission with the responsibility of a "court of record". Art. 9, § 19, Okl. Const. When the Commission acts in an adversary setting in which it is called upon to apply the governing principles of law to the facts in dispute, it sits as a court of record and functions in an adjudicative capacity. *Monson, supra* note 63, 673 P.2d at 842; Hair v. Oklahoma Corp. Com'n, Okl., 740 P.2d 134, 141 (1987).

It creates an impermissible dichotomy in procedure. It leaves ratemaking firmly under the rubric of Art. II's adjudicative process for APA-governed agencies but treats *the very same inquiry* before the Commission as "legislative." Because of that dichotomous division, litigants before APA-governed agencies would be entitled to neutral decisionmakers whereas those participating in like proceedings before the Commission might stand subjected to biased hearing examiners. The procedural uniformity mandate of Art. 5, § 46 dictates that litigants in individual ratemaking proceedings before both APA-governed agencies and the Commission be afforded the benefit of the Art. II § 316 [112] replacement mechanism.

Because the Legislature has committed itself to one form of procedure for individual ratemaking under Art. II of the APA, this court cannot by judicial fiat *mandate a different concept of procedure* for the Commission. Our own jurisprudence, no less than the Legislature's enactments, must faithfully conform to the state fundamental law's prohibition against non-uniform laws on prohibited subjects.[113] Procedure *in like proceedings* must be uniform. Art. 5, § 46, Okl.Const.[114]

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[112] For the pertinent terms of 75 O.S.1991 § 316, see *supra* note 96.

[113] *Reynolds, supra* note 111, 760 P.2d at 822; although directed to the Legislature, Art. 5, § 46, Okl.Const., *supra* note 110, is no less binding on the courts. Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment. A special law is one that rests on a false or deficient classification. *"It creates preference and establishes inequity."* Barrett v. Board of Com'rs of Tulsa County, 185 Okl. 111, 930 P.2d 442, 446 (1939); *Maule, supra* note 111, 714 P.2d at 203 n. 30; *Dabney, supra* note 111, 846 P.2d at 1096 n.12.

[114] For the pertinent terms of Art. 5, § 46, Okl. Const., see *supra* note 110.

IV.

A REPLACEMENT MECHANISM COULD BE FAIRLY READ INTO THE STATE CONSTITUTIONAL AND STATUTORY PROCEDURAL REGIME

A. *When A Commissioner Voluntarily Recuses Or Is Commanded To Disqualify, There Is A "Vacancy" For The Case Within The Meaning Of 51 O.S.1991 § 8 (Subdiv. 2), Which The Governor May Fill By A Pro Hac Vice Appointment*

While under state law there is no explicit replacement mechanism for a disqualified Commissioner, one could be read into our constitutional and statutory procedural regime. The terms of Art. 9, § 15, Okl.Const.,[115] expressly authorize the Governor to fill vacancies in the office of a Corporation Commissioner. Generally, when a vacancy occurs in a public office, and the law is silent as to the method for filling it, the terms of Art. 6, § 13, Okl.Const.,[116] expressly confer the power of appointment upon the Governor. Absent a constitutional prohibition, the Legislature may define the contingencies or events

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[115] The pertinent terms of Art. 9, § 15, Okl.Const., are:

"A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: * * * In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term."

[116] The pertinent terms of Art. 6, § 13, Okl.Const., are:

"The Governor shall commission all officers not otherwise commissioned by law. * * * When any office shall become vacant, he shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law."

that will cause an office to become vacant.[117] The terms of 51 O.S. 1191 § 8 [118] enumerate several occasions that result in a vacancy. By the terms of 51 O.S.1991 § 10,[119] these offices may then be filled by the Governor. The office of Corporation Commissioner, if left vacant by the death, resignation, removal or disqualification of the incumbent, is among those state offices which, in the exercise of his § 10 powers, the Governor may fill by appointment for the unexpired term.

Subdiv. 2 of § 8 provides that an office becomes vacant upon the incumbent's "failure to qualify as required by

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[117] The constitutional provisions that confer on the Governor the power to fill vacancies in the office of Corporation Commissioner, Art. 9, § 15, Okl.Const., *supra* note 115, as well as in other state offices, Art. 6, § 13, Okl.Const., *supra* note 116, do not expressly or by implication prohibit the Legislature from determining *when a vacancy may occur*. The "Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing." *Fair Sch. Finance Coun., supra* note 61, 746 P.2d at 1149; Tate v. Logan, Okl., 362 P.2d 670, 674 (1961); Miller v. Childers, 107 Okl. 57, 238 P. 204, 206 (1924).

[118] The terms of 51 O.S.1991 § 8 provide in pertinent part:

"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office:

* * *

"Second. His removal from office or *failure to qualify as required by law.*

* * *

The fact by reason whereof the vacancy arises *shall be determined by the authority authorized to fill such vacancy.*" (Emphasis added.)

[119] The terms of 51 O.S.1991 § 10 provide in pertinent part:

"(a) *All vacancies in state offices,* except in offices of the members of the Legislature, members of the House of Representatives from Oklahoma in the Congress of the United States of America and members of the Senate of the United States of America, *shall be filled by appointment by the Governor.* * * *" (Emphasis added.)

law." [120] Although this eventuality is commonly invocable when a public officer fails to do what the law declares necessary before the duties of an office may be assumed,[121] I would hold that Subdiv. 2 is broad enough to create a *pro hac vice* vacancy. In short, when an administrative decisionmaker *fails* to qualify to sit in a case, a *pro hac vice* vacancy results.[122]

Auxliary Post-Recusal Procedure For Filling A Pro Hac Vice Vacancy

In the exercise of his § 10 authority, the Governor is empowered to declare that a vacancy, which may be filled by appointment, has arisen as a result of one of the eventualities enumerated in § 8.[123] While this procedure is possible of effective implementation when a *permanent* vacancy may occur, it is not likely to put the

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[120] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 118.

[121] *See, e.g.*, State ex rel. Berge v. Lansing, 64 N.W. 1104, 1109-1110 (Neb. 1895) (the official bond was not timely presented); Brannon v. Perkey, 31 S.E.2d 898, 902-903 (W.Va. 1944) (the oath was not timely administered).

[122] The precise precedent for our decision in this case is not easily found. This is so because *before* the 1973 *Gibson* teachings, *supra* note 55, neutrality of administrative decisionmakers had not become a constitutional command. In short, the rule of impartiality, which has always governed the judiciary, did not apply to agency decisionmakers. *Today's mandate for detachment and neutrality is of a federal constitutional dimension.* Recusal cases may hence come to us from the agencies with greater frequency than ever before.

One judicial commentator points out that "English judges and scholars consider that we [Americans] have simply gone mad" in our tendency to judicialize administrative procedures. *Thus, it is all the more relevant that one of the two elements of "natural justice" which British courts hold essential in all adjudicatory contexts is the right to an unbiased administrative decisionmaker. See Friendly, supra* note 60 at 1269.

[123] *See* 51 O.S.1991 § 8, *supra* note 118.

Governor on notice in case of a *pro hac vice* vacancy occasioned by a recused or disqualified Commissioner. No prescribed statutory procedure is found for filling a temporary § 8 vacancy for *a single case*. The Governor neither scans, nor has the duty to monitor, cases in process of adjudication. I would hence depart from the § 10 regime to fashion a *different parallel procedure* for *pro hac vice* appointments to the office of Corporation Commissioner.

When a Commissioner's disqualification creates a *pro hac vice* vacancy, the Commission could either notify the Governor and request that the vacancy be filled immediately, or the Commission may wait until a deadlock has occurred before requesting an appointment. The post-recusal mechanism I would craft, which merely supplements the § 10 procedure, will promote a smooth and efficient processing of agency cases. I would caution that a request at *an advanced stage of proceedings* may occasion additional delay. A *pro hac vice* Commissioner, appointed while the case is moving toward its completion, would doubtless need additional time to study the record or may require that some of the evidence be re-presented.

SUMMARY

Today's self-caponizing decisional process closes its eyes (1) to this century's growth of federal due process protections that surround on-the-record or individual ratemaking as well as (2) to the mid-twentieth century "incorporation doctrine" [124] which transformed most of the *Bill of Rights' values into commands enforceable against every nonconforming state government action—legislative, judicial or executive.* Ratemaking for application to a single public utility is individual ratemaking for "special application." *It is clothed with due process safeguards.*

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[124] Adamson v. California, 332 U.S. 46, 68, 67 S.Ct. 1672, 1684, 91 L.Ed. 1903 (1947) (Black, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 646-648, 81 S.Ct. 1684, 1686-1687, 6 L.Ed.2d 1081 (1961).

Among these is the right to *a neutral decisionmaker.* Oklahoma has recognized (in 75 O.S.Supp. 1992 § 250.3 (2)(b)) this category of contests as a class distinct from general "rulemaking" and placed them under *the strictures of Art. II agency adjudication process.*

Oklahoma *may not today* (1) without violating the *Federal Constitution's Due Process Clause,* withdraw from the Commission's ratemaking for a single public utility the critical component of a decisionmaker's detachment and neutrality; (2) without violating the Fourteenth Amendment's *Equal Protection Clause,* withdraw from the Commission's individual ratemaking the same due process safeguards which must be afforded in like proceedings before APA-governed agencies; and (3) without offending the *uniformity-of-procedure mandate* in Art. 5, § 46, Okl.Const., withhold from individual public utility ratemaking by the Commission the procedural attributes of adjudication which are ascribed to that proceeding by the provisions of § 250.3(2)(b). I would hold today that in PUD-260 the *Corporation Commission* cannot meet the federal due process standards of neutrality and detachment.[125] I would hence declare that Commissioner Anthony is disqualified and that his lack of detachment calls for his replacement. The replacement mechanism should be drawn either from § 316 of the APA or from the provisions of 51 O.S. 1991 § 8.

My view of Commissioner Anthony's status does not reflect adversely on his conduct of voluntarily assisting

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[125] Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 827-828, 106 S.Ct. 1580, 1588, 89 L.Ed.2d 823 (1986). Commissioner Anthony's exclusion seems critical to SWB's fate in this case. Though personal bias of one lawmaker in a large legislative body might be viewed as diffused by the multitude of others in the assembly's membership, it is different before a three-member tribunal where there is but a very thin insulation against one commissioner whose neutrality status may be viewed as even marginally clouded. See *Association of Nat. Advertisers, supra* note 24, 627 F.2d at 1193 (MacKinnon, J., dissenting in part and concurring in part).

in the efforts to expose what he doubtless perceived as corrupt ratemaking practices; rather, it appeals for absolute obedience to the mandatory federal constitutional safeguards for individual ratemaking contests, which so very clearly protect public utilities' property interests from impermissible state action. Anthony's disqualification need not be feared as a *triumph* of the forces of darkness and as *punishment* for his virtuous deeds. *Far from it.* Ordering Anthony to step aside is to reaffirm the people's *faith* in the reality of their passionate commitment to *evenhanded* governmental decisionmaking (no matter who, or what interests, may have tipped the scales) and to make the Constitution's rule of fundamental fairness the *ultimate victor* in today's struggle between competing political values.

APPENDIX B

[Filed May 25, 1993]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 80,579

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

ORIGINAL PROCEEDING FOR A PREROGATIVE WRIT

Petitioner's quest to declare Commissioner Anthony disqualified from sitting in Cause No. PUD-260.

ORIGINAL JURISDICTION ASSUMED; WRIT GRANTED

OPALA, J.

In this original proceeding the two issues to be decided are: (1) Is Corporation Commissioner Anthony [Anthony] disqualified from participation in Cause No. PUD-260 [1] on the agency docket? and if so, (2) Does a "va-

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[1] PUD-260, a utility rate-setting proceeding, had begun below as an investigation by the director of the agency's public utility division into the effect of the federal Tax Reform Act of 1986 upon Oklahoma utilities. The initial Commission order was affirmed in part and reversed in part and the cause was remanded for further proceedings. State ex rel. Henry v. Southwestern Bell, Okl., 825 P.2d 1305 (1992). ***The present controversy over Commissioner Anthony's disqualification arose after the earlier remand.***

cancy" arise—within the meaning of 51 O.S. 1991 § 8[2] —upon an incumbent Commissioner's disqualification, which may be filled by a gubernatorial appointment *pro hac vice*?[3] We answer both questions in the affirmative.

Petitioner Southwestern Bell Telephone Company [SWB] seeks this court's command that would disqualify Commissioner Anthony from sitting in Corporation Commission [Commission] proceeding PUD-260[4] as well as in *all* pending and future SWB cases. SWB asserts that Anthony's public statement of October 2, 1992,[5] consid-

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[2] For the terms of 51 O.S.1991 § 8, see *infra* note 24.

[3] Freely translated from Latin, the phrase "vacancy *pro hac vice*" means a vacancy *for* the case in progress. Black's Law Dictionary gives a similar definition for the phrase *pro hac vice*: "*For* this turn; *for* this one particular occasion. A lawyer may be admitted to practice in a jurisdiction [in which he is not licensed] *for* a particular case only." (Emphasis supplied.) *Id.*, at 1212 (6th Ed. 1990).

[4] *See supra* note 1.

[5] Commissioner Anthony made the following statement on October 2, 1992:

> "As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to Southwestern Bell case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with Southwestern Bell and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.
>
> As an additional matter which has at least partial bearing on the PUD 260 case or other Southwestern Bell cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner

ered together with a motion he filed in the case to compel SWB to produce certain notes and documents,[6] make it manifestly impossible for him to resolve in a neutral and detached manner the controversy which affects SWB's interests.

I

SWB HAS A FEDERAL CONSTITUTIONAL CLAIM TO A NEUTRAL AND DETACHED DECISION-MAKER

Administrative adjudicators must be as neutral and detached as a judge is called upon to be by the applicable standards of federal due process.[7] "[A] fair trial in a fair

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in 1989, individuals associated with regulated companies have offered me cash or inducements.

With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.

Furthermore, I will report that more than a year ago I separately advised a Southwestern Bell senior corporate officer and then later a senior corporate attorney with Southwestern Bell of the conduct of persons associated with their firm.

I have delayed making this announcement for as long as possible in order to avoid compromising the Federal investigation. I have been advised a limited announcement pursuant to my commission responsibilities should have no adverse conseqence on the FBI's investigation. I come forward at this time because the parties to cases at the Corporation Commission have rights which must be protected."

[6] The notes sought by Anthony's motion *relate to conversations he had with a SWB senior corporate officer and SWB senior corporate lawyer about the conduct of persons associated with their firm*, which is believed to be *pertinent to the rate case at hand (PUB-260)*.

[7] The Due Process Clause of the 14th Amend., § 1, U.S.Const., commands that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."

tribunal is a basic requirement of due process." [8] Our due process clause, Art. 2, § 7, Okl.Const.,[9] has a definitional sweep that is co-extensive with its federal counterpart.[10]

In Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973), the Court states:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). And Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '*[m]ost of the law concerning disqualification* because of interest *applies with equal force to . . . administrative adjudicators.*' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." (Emphasis added.)

In Friedman v. Rogers, 440 U.S. 1, 18, 99 S.Ct. 887, 898, 59 L.Ed.2d 100 (1979), the court notes that Rogers, an optometrist, has "a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board [of Optometry]." *Id.*, citing *Gibson v. Berryhill, supra.*

[8] In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors." M. H. Redish and L. C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.Journal 455, 483 (1986).

[9] The terms of Art. 2, § 7, Okl.Const., are:
"No person shall be deprived of life, liberty, or property, without due process of law."

[10] Messenger v. Messenger, Okl., 827 P.2d 865, 872 (1992); Fair School Finance Council v. State, Okl., 746 P.2d 1135, 1148 n.48 (1987); Matter of Rich, Okl., 604 P.2d 1248, 1250-1251 (1979);

This case presents more than mere allegations of bias and prejudice. At the core here is the question whether *Anthony's actions* reflect adversely on his posture as a neutral and detached adjudicator.[11] According to his public announcement on file herein, in which he conceded making ex parte statements to certain officials of SWB, he had been serving for nearly four years as informant and investigator of federal-law violations ascribed to certain Commission-regulated utilities.[12] Because the principle of impartiality that governs the *cold neutrality and detachment* of judges applies with equal force to administrative adjudicators,[13] we must declare that Commissioner Anthony is disqualified in PUD-260.

McKeever Drilling Co. v. Egbert, 170 Okl. 259, 40 P.2d 32, 35 (1935). *See* Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972), citing Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531 (1864) and Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

[11] Our fundamental law explicitly charges the Corporation Commission with the responsibility of a "court of record". Art. 9, § 19, Okl. Const. When the Commission acts in an adversary setting in which it is called upon to apply the governing principles of law to the facts in dispute, it sits as a court of record and functions in an adjudicative capacity. Monson v. State ex rel. Okl. Corp. Com'n, Okl., 673 P.2d 839, 842 (1983); Hair v. Oklahoma Corp. Com'n, Okl., 740 P.2d 134, 141 (1987).

[12] For the text of the October 2, 1992 statement, see *supra* note 5.

[13] *Gibson, supra* note 7; *Friedman, supra* note 7.

When setting rates the Corporation Commission acts in a legislative capacity. Wiley v. Oklahoma Natural Gas Company, Okl., 429 P.2d 957, 958 (1967); Chickasha Cotton Oil Co. v. Corp. Comm., Okl., 562 P.2d 507, 509 (1977); Application of Valliant Tel. Co., Okl., 656 P.2d 273, 275 (1982); Turpen v. Oklahoma Corp. Com'n, Okl., 769 P.2d 1309, 1317 (1989).

There can be no legal basis for withholding from utility-rate hearings the Due Process protection conferred by *Gibson, supra* note 7. The *Gibson* teachings apply *with the same force to adversary utility-rate hearings as they do to any run-of-the-mill administrative adjudications.*

Today's disqualification, which applies solely to the case in which it was pressed (PUD-260), does not affect the post-decisional proceedings authorized by this court's February 9, 1993 order in *Southwestern Bell Telephone Company v. Oklahoma Corporation Commission.*[14] That case, unlike PUD-260, has been decided and is now on appeal. We save for another day the questions (1) whether SWB's successful challenge today also disqualifies Anthony from participating *in any other pending or future cases in which SWB may be interested or a party* and (2) whether an evidentiary proceeding might be required to determine Anthony's disqualification in utility-rate cases other than PUD-260.

II

WHEN A COMMISSIONER VOLUNTARILY RECUSES OR IS COMMANDED TO DISQUALIFY, THERE IS A "VACANCY" *FOR THE CASE* WITHIN THE MEANING OF 51 O.S.1991 § 8 (SUBDIV. 2), WHICH THE GOVERNOR MAY FILL BY A *PRO HAC VICE* APPOINTMENT

The Corporation Commission consists of three commissioners who have the exclusive authority to regulate public service corporations.[15] The concurrence of two commissioners is required to decide any question.[16] Even

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[14] Southwestern Bell Telephone Company v. Oklahoma Corporation Commission, No. 80,333 (consolidated with Nos. 80,334, 80,340, 80,342 and 80,345). In that appeal we afforded SWB the opportunity (a) to elicit below *after-acquired evidence,* if any there be, that would tend to show Commissioner Anthony was disqualified at the time he sat as a decision-maker in PUD-662, a case different from PUD-260, and (b) to supplement the record in this court by including in it a transcript of the disqualification proceedings to be conducted pursuant to the authority conferred by our order.

[15] Art. 9, §§ 15, 18, Okl.Const.

[16] The terms of Art. 9, § 18a, Okl. Const., are:

though the State constitution allows the Commission to sit with a quorum of two commissioners,[17] to do so in a complex rate case might be inefficient since in the event of a tie vote proceedings would be unduly prolonged.

Oklahoma jurisprudence does not afford a mechanism for breaking a tie when the Corporation Commission adjudicators are evenly divided. In original proceedings brought here over the last decade this court has *twice* come to grips with quests for the recusal of a Corporation Commission member.[18] In *ETSI* [19] the court disqualified Commissioner Townsend, declaring that members of an agency sitting in an adjudicative capacity must meet the criteria of neutral and detached decision-makers. In *Cooperative Ginners'* the court assumed original jurisdic-

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"* * * A majority of said Commission shall constitute a quorum, and the concurrence of the majority of said Commission shall be necessary to decide any question."

[17] Art. 9, § 18a, Okl. Const., *supra* note 16.

[18] ETSI Pipeline Project et al v. Townsend, Sup. Ct. No. 58,707 (original jurisdiction assumed and writ granted *by unpublished order* of September 9, 1982) and Cooperative Ginners' Association of Oklahoma et al v. Anthony and Watts, Sup.Ct.No. 78,510 (original jurisdiction assumed and writ of mandamus denied *by unpublished order* of January 28, 1992).

[19] *ETSI*, *supra* note 18. The September 9, 1982 order states:

"Writ granted directing the Honorable James Townsend, member of the Corporation Commission, respondent herein, to certify his recusal in Cause No. 27470, on the docket of the Corporation Commission, and to forward a certified copy thereof to the Governor of the State of Oklahoma. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 [1973]."

No mention is made of Townsend's recusal in the published decision of the case in which he was disqualified. Missouri-Kansas-Texas Railroad Co. v. State, Okl., 712 P.2d 40 (1986). *After Commissioner Townsend had been disqualified by an order of this court, the Governor either declined or was never asked to fill the vacancy by a pro hac vice appointment.* ETSI was decided by the concurrence of two elected commissioners who sat in the case.

tion but refused to disqualify Commissioners Anthony and Watts.[20]

If the law were to provide *no* mechanism for replacing a disqualified Corporation Commissioner, a "rule of necessity"[21] would permit the challenged agency member to sit in the case. In this case there is no need to invoke this common-law rule of necessity because, as we conclude today, the provisions of Art. 6, § 13[22] and Art. 9, § 15, Okl.Const.,[23] as well as those of 51 O.S.1991 §§ 8 and

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[20] The *unpublished order* in *Cooperative Ginners', supra* note 18, states: "Original jurisdiction is assumed. Application for writ of mandamus requiring Commissioners Bob Anthony and J.C. Watts, Jr., to recuse is denied. * * *" There, I joined in *not* disqualifying Commissioners Anthony and Watts. It was *then* my opinion that the "rule of necessity", *infra* note 21, was applicable to Corporation Commission members. *Id.* (Opala, C.J. dissenting from order of January 28, 1992). Since then I have changed my position, now taking the view articulated today in Part II of this opinion that the law *does indeed provide a mechanism for replacing a disqualified commissioner.*

[21] The rule of necessity rests on a well-established common-law principle *that, regardless of bias, judges have a duty to sit if they alone have the power to decide the matter before them.* United States v. Will, 449 U.S. 200, 214-216, 101 S.Ct. 471, 480-481, 66 L.Ed.2d 392 (1980). *Where a mechanism is in existence for replacing a disqualified tribunal member, the successfully challenged decison-maker must step aside.* Brinkley v. Hassig, 83 F.2d. 351, 357 (10th Cir. 1936).

[22] The pertinent terms of Art. 6, § 13, Okl.Const., are:

"The Governor shall commission all officers not otherwise commissioned by law. * * * When any office shall become vacant, he shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law."

[23] The pertinent terms of Art. 9, § 15, Okl.Const., are:

"A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: * * * In case of a vacancy in said office, the

10,[24] construed together, *afford an effective post-recusal mechanism for replacing a disqualified Commissioner.*

The Constitutional and Statutory Procedural Regime

The terms of Art. 9, § 15, Okl.Const.,[25] expressly authorize the Governor to fill vacancies in the office of a Corporation Commissioner. Generally, when a vacancy occurs in a public office, and the law is silent as to the method for filling it, the terms of Art. 6, § 13, Okl. Const.,[26] expressly confer the power of appointment upon the Governor. Absent a constitutional prohibition, the Legislature may define the contingencies or events that

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Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term."

[24] The terms of 51 O.S.1991 § 8 provide in pertinent part:

"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office:

* * *

"Second. His removal from office or *failure to qualify as required by law.*

* * *

The fact by reason whereof the vacancy arises *shall be determined by the authority authorized to fill such vacancy.*" (Emphasis added.)

The terms of 51 O.S.1991 § 10 provide in pertinent part:

"(a) *All vacancies in state offices,* except in offices of the members of the Legislature, members of the House of Representatives from Oklahoma in the Congress of the United States of America and members of the Senate of the United States of America, *shall be filled by appointment by the Governor.* * * *" (Emphasis added.)

[25] For the pertinent terms of Art. 9, § 15, Okl.Const., see *supra* note 23.

[26] For the pertinent terms of Art. 6, § 13, Okl.Const., see *supra* note 22.

will cause an office to become vacant.[27] The terms of O.S. 1991 § 8 [28] enumerate several occasions that result in a vacancy. By the terms of 51 O.S.1991 § 10,[29] these offices may then be filled by the Governor. The office of Corporation Commissioner, if left vacant by the death, resignation, removal or disqualification of the incumbent, is among those state offices which, in the exercise of his § 10 powers, the Governor may fill by appointment for the unexpired term.

Subdiv. 2 of § 8 provides that an office becomes vacant upon the incumbent's "failure to qualify as required by law." [30] Although this eventuality is commonly invocable when a public officer fails to do what the law declares necessary before the duties of an office can be assumed,[31] we hold today that Subdiv. 2 is broad enough to precipitate a *pro hac vice* vacancy. In short, when an administrative decision-maker *fails* to qualify to sit in a case, a *pro hac vice* vacancy is created.[32]

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[27] The constitutional provisions that confer on the Governor the power to fill vacancies in the office of Corporation Commissioner, Art. 9, § 15, Okl.Const., *supra* note 23, as well as in other state offices, Art. 6, § 13, Okl.Const., *supra* note 22, do not expressly or by implication prohibit the Legislature from determining *when a vacancy may occur*. The "Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing." *Fair School Finance Council, supra* note 10 at 1149; Tate v. Logan, Okl., 362 P.2d 670, 674 (1961); Miller v. Childers, 107 Okl. 57, 238 P. 204, 206 (1924).

[28] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 24.

[29] For the text of 51 O.S.1991 § 10, see *supra* note 24.

[30] For the text of 51 O.S.1991 § 8 (Subdiv. 2), see *supra* note 24.

[31] *See, e.g.*, State ex rel. Berge v. Lansing, 64 N.W. 1104, 1109-1110 (Neb. 1895) (the official bond was not timely presented); Brannon v. Perkey, 31 S.E.2d 898, 902-903 (W.Va 1944) (the oath was not timely administered).

[32] The precise precedent for our decision in this case is not easily found. This is so because *before* the 1973 *Gibson* teach-

Auxiliary Post-Recusal Procedure For Filling A Pro Hac Vice Vacancy

In the exercise of his § 10 authority, the Governor is empowered to declare that a vacancy, which may be filled by appointment, has arisen as a result of one of the eventualities enumerated in § 8.[33] While this procedure is possible of effective implementation when a *permanent* vacancy may occur, it is not likely to put the Governor on notice in case of a *pro hac vice* vacancy in the office of a recused Commissioner. No prescribed statutory procedure is found for filling a temporary § 8 vacancy for *a single case*. The Governor neither scans, nor has the duty to monitor, cases in process of adjudication. We hence must depart today from the § 10 regime to fashion a *different parallel procedure* for *pro hac vice* appointments to the office of Corporation Commissioner.

When a Commissioner's disqualification creates a *pro hac vice* vacancy, the Commission may either notify the Governor and request that the vacancy be filled immediately, or the Commission may wait until a deadlock occurs before requesting an appointment. The post-recusal mechanism we craft today, which merely supplements the § 10 procedure, will promote a smooth and

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ings, *supra* note 7, neutrality of administrative adjudicators had not become a constitutional command. In short, the rule of impartiality, which has always governed the judiciary, did not apply to agency adjudicators. *Today's mandate for detachment and neutrality is of a federal constitutional dimension.* Recusal cases may hence come to us from the agencies with greater frequency than ever before.

Our judicial commentator points out that "English judges and scholars consider that we [Americans] have simply gone mad" in our tendency to judicialize administrative procedures. *Thus, it is all the more relevant that one of the two elements of "natural justice" which British courts hold essential in all adjudicatory contexts is the right to an unbiased adjudicator. See* Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1269 (1975).

[33] *See* 51 O.S.1991 § 8, *supra* note 24.

efficient processing of agency cases. We caution that a request at an advanced stage of a proceeding may occasion additional delay. A *pro hac vice* Commissioner, appointed while the case is moving toward its completion, would doubtless need additional time to study the record or may require that some of the evidence be re-presented.

SUMMARY

A Corporation Commission adjudicator must meet the standard of neutrality and detachment required of a judge by federal due process. Due process norms apply to the Corporation Commission sitting in a rate-setting proceeding. Upon the disqualification of a Commissioner, a *pro hac vice* vacancy occurs within the meaning of 51 O.S.1991 § 8. In the exercise of his 51 O.S.1991 § 10 powers, the Governor is authorized to fill a *pro hac vice* vacancy created by a Commissioner's recusal. The auxiliary procedure we fashion today for submission of requests to fill *pro hac vice* vacancies will serve as an effective post-recusal mechanism for replacing disqualified adjudicators.

Let the writ issue commanding Commissioner Anthony to certify his disqualification in PUD-260. ORIGINAL JURISDICTION ASSUMED; WRIT OF MANDAMUS GRANTED.

LAVENDER, V.C.J., and HARGRAVE, OPALA, WILSON, KAUGER and WATT, JJ., concur;

SIMMS, J., concurs in part and dissents in part;

HODGES, C.J., disqualified.

SIMMS, J., DISSENTING:

I must respectfully dissent. Today the majority has stripped the sovereign power from the people of this State to choose the members of the Corporation Commission and placed it in the hands of this Court and the Governor. Having been elected by the voters, Commissioner Anthony's tenure in office and conditions of service are fixed by the constitution, art. 9, §§ 15-18, and laws implementing those provisions. He may not be involuntarily removed from that office except as provided by law. *See State, ex rel., Blankenship v. Freeman*, Okl., 440 P.2d 744 (1968). As no vacancy established by law exists, there is no vacancy to fill. See generally, *Carpenter v. Carter*, 167 Okl. 238, 29 P.2d 83 (1939); *Hood v. Miller*, 144 Okl. 288, 291 P. 504 (1930).

In the absence of a constitutional grant of power to do so, this Court has no power to declare a temporary vacancy in the Corporation Commission; neither can it empower the Governor to fill this vacancy. It should be remembered that unlike the legislature, which possesses all power *not denied it* by the federal and state constitutions, the executive and judicial departments have only those powers *granted* to them by the constitution. See generally, *Peebly v. Childers*, 95 Okl. 40, 217 P. 1049 (1923); *Wentz v. Thomas*, 159 Okl. 124, 15 P.2d 65 (1932).

It seems obvious to me that today's intrusions by the majority over the boundaries separating the three departments of government are of no small consequence. While no one would champion corruption or unfair dealing by a public official in any capacity, there is no authority for the majority's resolution of this situation and, in the long run, its decision creates more problems of greater significance for the citizens and their government than it solves.

This Court has repeatedly and consistently recognized that rate-making is a legislative function of the Corpora-

tion Commission. See *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okl. 243, 51 P.2d 327 (1935); *Russell v. Walker*, 160 Okl. 145, 15 P.2d 114 (1932). See also, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). Even in this opinion the majority continues to recognize that fact (See footnote 13). Now, however, for the first time, the Court crafts rate-makers into a judicial posture and insists that judicial standards be met in a legislative proceeding—thereby creating the foundation for Anthony's involuntary "judicial" disqualification and his removal and replacement by the Governor. There is no authority for the majority's new rule that persons acting in a legislative capacity must meet standards required of judicial decision makers. Certainly *Gibson v. Berryhill*, supra, on which the majority relies, does not support the outcome of this decision. That case involves the Board of Optometry of Alabama, a licensing body, acting in an obvious adjudicatory capacity and has no application to the matter at hand.

Are all state officers now bound to comply with judicial standards of conduct when they act in a legislative capacity? In this regard it is interesting that while the Court imposes judicial standards on Commissioner Anthony when he acts in a legislative capacity, the Court itself, acting in a judicial capacity here, denies Anthony any opportunity to be heard and present evidence in his behalf, thereby violating his rights to due process of law.

If these allegations warrant further inquiry and investigation, the interests of the public will be served and the rights of the Commissioners protected only if the proceedings are brought as provided by law. Only when the facts and circumstances are scrutinized in a proper and open forum, where parties have an opportunity to fully litigate factual issues with competent evidence presented by sworn witnesses, may a lawful adjudication

be made as to whether a Commissioner has forfeited or vacated his office or grounds exist for removal.

I believe that the powers fashioned by the Court in this decision are unauthorized by the constitution and that any action taken in exercise of those powers will be ineffective for all purposes.

APPENDIX C

SUPREME COURT OF OKLAHOMA

No. 74194

STATE OF OKLAHOMA ex rel. ROBERT H. HENRY, Attorney General, and AM[illegible]CAN ASSOCIATION OF RETIRED PERSONS,

Appellants,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Appellee/Cross-Appellant,

and

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Appellee/Cross-Appellee.

Dec. 24, 1991

As Modified on Denial of Rehearing
March 2, 1992

On appeal from an order of the
Corporation Commission

In a proceeding initiated by the Director of the Corporation Commission's Public Utility Division to investigate

the effects of the federal Tax Reform Act of 1986 upon Oklahoma utilities, the Corporation Commission (composed of commissioners Bob Anthony, who concurred in part and dissented in part, Bob Hopkins and James B. Townsend) ordered, among other things, the revision of rates charged to Oklahoma ratepayers by Southwestern Bell Telephone Company (SWB) and the implementation and accounting of service improvement programs to be conducted by SWB.

AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS PRONOUNCEMENT.

OPALA, Chief Justice.

The issues to be resolved in this appeal are: (1) Does American Association of Retired Persons (AARP) have standing to seek corrective relief from the order tendered for review? (2) Is a public service corporation, *i.e.*, Southwestern Bell Telephone Company (SWB), required by law to refund to its ratepayers surplus cash generated by a tax law change? (3) In determining the sum of surplus cash accumulated by SWB, may the Corporation Commission (Commission) include accrued interest? (4) Was it error for the Commission to direct SWB to apply the surplus cash toward upgrading the multi-party line areas of the state to single-party line service? (5) Is the decision to upgrade central offices supported by substantial evidence? (6) Did the Commission impermissibly enlarge its inquiry into the effects of federal tax law changes upon Oklahoma public utilities by also considering evidence of changes in SWB's business operations? (7) If not, (a) Is the Commission's finding that a depreciation reserve deficiency[1] exists supported by sub-

[1] According to the Commission's order "[a] depreciation reserve deficiency arises when depreciation rates previously estab-

stantial evidence? (b) Does SWB's failure to produce certain audit-related information afford the Commission legally sufficient grounds to exclude severance pay expense from SWB's revenue requirements? (c) In calculating SWB's "cash working capital" [2] was it error for the Commission to exclude "local service revenues billed in advance?" and (d) Must the Commission have attributed interest to SWB's excess deferred income taxes? [3] We answer questions 1, 3 and 7(c) in the affirmative and questions 2, 4, 5, 6 and 7(a), (b) and (d) in the negative.

I.

THE CRITICAL FACTS IN LITIGATION

In October of 1986 the Director of the Corporation Commission's Public Utility Division, Howard W. Motley, Jr., initiated proceedings to "inquir[e] into the effect of the 1986 Tax Reform Act on Oklahoma utilities." [4] Twelve companies, including Southwestern Bell Telephone Company (SWB), were named as respondents [5] and ordered to participate in a "technical conference"

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lished for plant and equipment become inadequate due to technological or physical obsolescence of the plant and equipment." The potential impact of a depreciation reserve deficiency upon rates is discussed in Part VIII of this opinion.

[2] The concept of "cash working capital" is explained in Part X of this opinion.

[3] Part XI of this opinion deals with the question regarding interest on "excess deferred income taxes."

[4] See 26 U.S.C. § 11(b)(1)(C), *infra* note 17.

[5] The other respondents named in the proceeding were Arkansas Louisiana Gas Company, Arkansas Oklahoma Gas Corporation, Empire District Electric Company, General Telephone Company of the Southwest, KPL Gas Service Company, Lone Star Gas Company, Oklahoma Gas & Electric Company, Oklahoma Natural Gas Company, Public Service Company of Oklahoma, Southern Union Gas Company, and Southwestern Public Service Company.

with the Commission's staff (Staff) for the purpose of "establish[ing] the scope of the information required to determine the effect of the Tax Act."[6] According to the appellate record, the proceeding's next stage began on June 12, 1987, when notice was given to SWB and to "all interested parties" of a "hearing on the rates of Southwestern Bell Telephone Company" to be held on June 23, 1987. On the latter date, Staff and SWB stipulated in writing that if the Commission, after taking into account "all known and measurable changes" in SWB's business, determines a reduction in the utility's rates to be warranted, the reduced rates would become effective July 1, 1987, the effective date of the Tax Reform Act of 1986. The Commission approved the stipulation.[7]

At the June 23, 1987 hearing the accounting manager for the Commission's Public Utility Division testified that "the 1986 Tax Reform Act reduced the corporate income tax rate from 46% to 34% . . . which equates to a 40% income tax rate for 1987 and a 34% tax rate prospectively to flow to the customers of Oklahoma." The case was then assigned to a hearing officer for the express purpose of "taking evidence, hearing and reporting thereon to the Commission." The hearing, which was initially set for December 7, 1987, came to be postponed many times because several parties had intervened, including one of the appellants, American Asso-

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[6] According to director Motley's application, three other matters were slated for consideration at the technical conference: 1) the "timing for providing . . . information for quantification and regulatory treatment, 2) the "unrecorded tax liabilities which have been disclosed for financial reporting purposes but not addressed from a regulatory standpoint" and 3) "the treatment of the tax rate change on deferred taxes related to non-depreciation items." *This opinion does not address itself to any of these considerations.*

[7] The Commission expressly found the terms of the stipulation between SWB and Staff to be "fair, reasonable and equitable."

ciation of Retired Persons (AARP). It eventually took place on January 26, 27, 30 and February 3, 1989.

A myriad of witnesses testified on behalf of the State, SWB, AARP and Staff. In addition to live testimony, several parties offered "pre-filed testimony," which consists of written responses to questions prepared in advance of the hearing. These statements, most of which are accompanied by supporting documentation, were introduced and admitted as exhibits. After the hearing each party tendered its own proposed findings of fact and conclusions of law. The hearing officer adopted Staff's recommendations *in toto*.

Based upon its own assessment of the evidence adduced at the hearing, the Commission adopted nearly all of the findings made by the hearing officer. The Commission findings which are pertinent to the issues tendered in this appeal are: (1) the Tax Reform Act of 1986 reduced the federal corporate income tax rate from 46% to 34% and caused SWB to accumulate $30,677,167.00 in surplus cash between January 1, 1987 and September 30, 1989, (2) "Staff appropriately considered [other] known and measurable changes in SWB's business operations in Oklahoma, (3) a $180 million deficiency exists in SWB's depreciation reserve, (4) Staff was correct in applying October 1986 levels of "separations factors" [8] when calculating SWB's rate base, (5) severance pay expenses were correctly excluded from the determination of SWB's revenue requirements, (6) in calculating SWB's "cash working capital," Staff correctly excluded "local service revenue billed in advance" and (7) interest should not be charged against SWB's excess deferred income taxes.

In accordance with these findings the Commission ordered that (a) interest is to be applied to SWB's surplus cash (or revenue excess) at the annual rate of 11.589%,

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[8] For the meaning of "separations" see *infra* note 39.

(b) the revenues generated by tax law changes should not be refunded to ratepayers but instead are to be used for upgrading service, *i.e.*, converting multi-party line areas to single-party service and modernizing central offices, (c) SWB must "file tariffs and rate schedules consistent with this order," implement the service improvement programs and rate reductions and submit a "private letter ruling request consistent with the purposes and findings set forth herein" and (d) "as a matter of policy" the depreciation reserve deficiency is to be amortized over a four-year period to provide "rate stability" for Oklahoma ratepayers.[9]

The State, AARP and SWB each seek corrective relief from arious portions of the Commission's order. For the reasons to be stated we affirm in part, reverse in part and remand this cause for further poceedings.

II.

AARP HAS STANDING TO APPEAL

SWB agues that AARP lacks standing to seek corrective relief because it is not aggrieved by the Commission's order. We are told that the State, through the Attorney General's office, and the Commission's Staff sufficiently protect "AARP's interest . . . to the same extent [that the interests of] . . . other ratepayers [are protected]." SWB claims "[t]here is no distinct injury to AARP" and the Commission's order now before us "cannot possibly cause injury, because it not only confers a benefit on

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[9] The Commission's order also requires Staff to (1) "investigate and determine the adequacy of Southwestern Bell Telephone Company's labor tracking mechanism in Cause No. PUD000662" and (2) "apply to the Commission for an order requiring production of any information which is not produced in a timely manner." SWB, in turn, must "assist the Staff in its investigation in Cause No. PUD000662 concerning the Yellow Pages." Because none of the parties in this appeal complains about any of these portions of the order, we leave them undisturbed.

Oklahoma ratepayers by ordering expenditures of funds for service improvements, it actually reduces mileage charges and rates for MTS and WATS services." [10] We are not persuaded by these arguments. As SWB points out in its own brief, the terms of Art. 9 § 20, Okl.Const.,[11]

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[10] The Commission's order does call for the following rate reductions:

> "The Commission finds that due to a lower revenue requirement, rate reductions are appropriate in certain categories of service as recommended by Staff witnesses Schroeder and Motley. The Commission finds that the rate design effecting a reduction in mileage charges and intraLATA MTS and WATS recommended by Staff is appropriate, especially because residential local exchange service is currently subsidized and priced substantially below cost and toll rates are priced substantially above costs.
>
> "Therefore, the Commission finds that SWBT shall implement new tariffs immediately in accordance with the following schedule:

	Total Annual Revenue Reduction
Mileage Charges	$6,380,000
IntraLATA MTS and WATS	$1,467,172

> "Mileage charges, currently paid by approximately 100,000 Oklahoma customers, shall be immediately reduced by 50 percent of SWBT's current tariffed rates. In addition, upon the conversion of a given central office (or exchange) to eliminate part-line service, flat rate mileage charges are to be applied as follows:

	Monthly Rate
Within 1 mile of base rate area boundry	$ .77
Outside of 1 mile from base rate area boundary	$3.85

> "All customers affected by the upgrade from the multi-party to single-party service shall be notified by SWBT of any changes in their monthly local exchange rate including immediate conversion to the appropriate one-party rate and mileage charges, as a result of the upgrade."

[11] The pertinent terms of Art. 9 § 20, Okl. Const., provide:

explicitly provide that an appeal may be brought *by "any party affected" or "any person deeming himself aggrieved"* [12] by any action of the Commission affecting the rates of a public service corporation.[13] AARP qualifies as a "party affected" by the order now before us.

AARP's membership is composed of individuals who presumably are ratepayers. SWB does not contend to the contrary. Inasmuch as AARP, on behalf of its membership, had *unsuccessfully* pressed the Commission for a *refund* of SWB's surplus cash, AARP certainly may deem itself aggrieved or affected by the Commission's order, which impacts upon telephone service as well as

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> *"From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation,* or any individual, person, firm, corporation, reciever or trustee engaged in the public utility business, *an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action,* or by the State, *directly to the Supreme Court of the State of Oklahoma,* in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, *except that such an appeal shall be of right,* and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. * * *" (Emphasis added.)

[12] The term "aggrieved party" includes one whose pecuniary interest in the subject matter is directly and injuriously affected by the decision from which the appeal is brought. *Cleary Petroleum Corp. v. Harrison, Okl.,* 621 P.2d 528, 530 (1980).

[13] A telephone company is a "transmission company," which, in turn, is a "public service corporation" within the meaning of Art. 9 § 34, Okl. Const., *infra. Southwestern Bell Tel. Co. v. State of Oklahoma,* 303 U.S. 206, 58 S.Ct. 528, 62 L.Ed. 751 (1938).

The pertinent terms of Art. 9 § 34, Okl. Const., provide:

> "* * * *The term 'public service corporation' shall include* all transportation and *transmission companies,* all gas, electric, heat, light and power companies. . . ." (Emphasis added.)

rates.[14] AARP doubtless has standing to press for relief in this appeal.[15]

III.

A PUBLIC SERVICE CORPORATION'S SURPLUS CASH GENERATED SOLELY BY CHANGES IN INCOME TAX LAWS NEED NOT BE REFUNDED TO RATEPAYERS

SWB, a public service corporation,[16] undisputedly accumulated over $30 million in surplus funds, which are attributed solely to the federal income tax law change.[17] The State and AARP contend that this sum should be treated as an "overcharge" within the meaning of 17

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[14] See *Missouri-Kansas-Texas R. Co. v. State*, Okl., 712 P.2d 40, 44 (1985), where an aggrieved unincorporated association was held to have standing to appeal from an order of the Corporation Commission.

[15] SWB had moved (1) to strike AARP's brief in response to SWB's cross appeal as "unauthorized" and (2) to bar AARP from addressing error included in its brief but omitted from its petition-in-error. Inasmuch as AARP has standing to seek corrective relief from the order tendered in this appeal, AARP certainly may respond to SWB's briefs. As for striking portions of AARP's brief, we treat AARP's petition-in-error as amended by brief. See Rule 1.17(a), Rules of Appellate Procedure in Civil Cases, 12 O.S.1981, Ch. 15, App. 2, *infra; Frazier v. Bryan Memorial Hosp. Authority*, Okl. 775 P.2d 281, 284 n. 12 (1989).

The pertinent terms of Rule 1.17(a) provide:

> "*The petition in error may be amended at any time before brief in chief is filed, or thereafter by leave of court,* to include any error or any issue presented to and resolved by the trial court which is supported by the record. . . ." (Emphasis added.)

[16] See *supra* note 13.

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[17] There is no question that the Tax Reform Act of 1986, *i.e.*, 26 U.S.C. § 11(b)(1)(C), *infra*, decreased the corporate income tax rate from 46% to 34%, effective July 1, 1987, and thereby

O.S.1981 § 121 [18] and hence *refunded* to Oklahoma ratepayers. Although § 121 does expressly require that overcharges be refunded, the question is whether the surplus cash in controversy resulted from "charges . . . in excess of the lawful rate." [19] We hold it did not.

The rates charged by SWB during the period in question (January 1, 1987 to September 30, 1989) clearly were authorized by the Commission. Inasmuch as SWB's accumulation of surplus funds is attributed solely to a decrease in the federal corporate income tax rate, this money was *not* obtained by overcharging ratepayers. Neither may the Commission's finding regarding the

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caused SWB's accumulation of surplus revenue or cash. The terms of 26 U.S.C. § 11(b)(1)(C) provide:

"(a) Corporations in general.—A tax is hereby imposed for each taxable year on the taxable income of every corporation.

"(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) shall be the sum of—

* * * *

(C) 34 percent of so much of the taxable income as exceeds $75,000.

In the case of a corporation which has taxable income in excess of $100,000 for any taxable year, the amount of tax determined under the preceding sentence for such taxable year shall be increased by the lesser of (i) 5 percent of such excess, or (ii) $11,750."

[18] The terms of 17 O.S.1981 § 121 provide:

"The Corporation Commission is hereby vested with the power of a court of record to determine: First, *the amount of refund due in all cases where any public service corporation,* person, or firm, as defined by the Constitution, *charges an amount for any service rendered by such public service corporation,* person, or firm, *in excess of the lawful rate in force at the time such charge was made, or may thereafter by declared to be the legal rate which should have been applied to the service rendered;* and, second, *to whom the overcharge should be paid.*" (Emphasis added.)

[19] See 17 O.S.1981 § 121, *supra* note 18.

federal tax law's effect upon SWB be regarded as a declaration that a different rate should have been charged. In short, § 121 affords *no* authority for requiring the refund sought by AARP and the State.

IV.

SWB IS ACCOUNTABLE FOR INTEREST ON THE SURPLUS CASH IN SUIT

SWB urges that the Commission erred in charging or holding it accountable for interest on the surplus cash generated by the decrease in the federal corporate income tax rate. We reject this contention. The briefs contain no authority which militates in favor of reversing the Commission's decision. It is beyond question that SWB had the use of the funds whose availability stands attributed to a tax law change alone and which came to SWB without consideration of its rate base.[20] "The presumption in the business world . . . and [in] equity, is that the use of money normally calls for the payment of interest." [21] We find this rule to be applicable in this case.[22]

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[20] "Rate base" is the amount upon which the utility is permitted to make a profit; it is based upon the value of property "used and useful in the public service business at the time the inquiry was made." *Turpen v. Oklahoma Corp. Com'n*, Okl., 769 P.2d 1309, 1320 n.25 (1989).

[21] *In re Will of Kalicicki*, 33 Wis.2d 277, 147 N.W.2d 343, 348 (1967). See also *United Gas Improve. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 230, 86 S.Ct. 360, 364, 15 L.Ed.2d 284 (1965), where the Court held that "the imposition of interest on refunds [paid by natural gas producers for charging excessive rates] *is not an inappropriate means of preventing unjust enrichment;*" *Phillips Petroluem Company v. Adams*, 513 F.2d 355, 368 (5th Cir.1975), where the court applied the equitable doctrine of unjust enrichment to require a pipeline company to pay interest on the principal sum it owed mineral interest owners and had held as "suspense money" pending a federal regulatory agency's decision.

[22] We also note that our decision regarding interest on the surplus cash accumulated by SWB is consistent with the legislature's

V.

SWB'S SURPLUS CASH MAY BE USED TO ELIMINATE MULTI-PARTY LINES IN THIS STATE

Having held that SWB need not refund its surplus cash to ratepayers, the next question to be answered is whether the Commission erred by directing SWB's use of those funds to upgrade telephone service. We answer in the negative.

The record leaves no doubt that the Commission viewed SWB's accumulation of surplus revenue as presenting a "unique opportunity to accomplish service and central office upgrades [23] in a manner which eliminates any adverse impact on basic exchange rates and any burden on ratepayers." [24] The Commission's decision in this regard was hence one of "policy," [25] and this court is not

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view that interest is chargeable on the amount due a customer who paid an excessive rate. See the amended version of 17 O.S. 1981 § 121, found in Okl.Sess.L.1991, ch. 332 § 1, effective July 1, 1991, whose pertinent terms provide:

> "The Corporation Commission is hereby vested with the power of a court of record to determine: First, *the amount of refund due and any interest owing upon such refund* in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge was made. . . ." (Emphasis added.)

[23] Part VI of this opinion deals with the Commission's approval to use part of SWB's surplus cash for central office improvements.

[24] The quoted language is excerpted from the Commission's order.

[25] The Commission's order further explains that "[o]ne of the most important goals espoused consistently over the years by this Commission has been the goal of universal service. Inherent in this goal is not only bringing affordable telephone service to the greatest number of people, but also providing the highest quality

free to disturb that ruling if it is supported by "substantial evidence." [26]

The Commission's efforts to replace multi-party lines with single-party connections are complemented by the "impossibility of identifying specific ratepayers" who would be entitled to a refund. Indeed, it would be inequitable to distribute funds based on some artificial formula that lacks a relation to the ratepayers' entitlement. In any event, there can be no doubt that the service improvements ordered by the Commission are *inherently beneficial* and supported by substantial evidence.[27] On this record we are not free to block the Commission from pursuing its "goal of universal service by implementing [this improvement program]." [28]

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service available. This Commission has had a longstanding service improvement program, but due to financial constraints, it has not been possible to implement such a program in a relatively short time frame."

[26] See *infra* note 30.

[27] The Commission found that "[u]pgrading multi-party service to single-party service will directly benefit approximately 54,000 Oklahoma customers who now have multi-party service. The Commission notes that the public comments submitted to this Commission overwhelmingly favored the proposed upgrade programs. All ratepayers will benefit indirectly from these programs. As the Staff explained in its testimony, and as explained in the Report of the Hearing Officer, the capital improvement plan proposed by the Staff avoids the borrowing costs and other costs that would normally be associated with such an ugrade. Such borrowing costs would normally be permissible and recoverable by SWBT as costs of service. By avoiding such costs, rates are kept lower for all Oklahoma ratepayers." *None of these findings is challenged in the briefs.*

[28] The Commission found that $30,677,167 of SWB's surplus revenue should be applied as follows:

"I. Party Line Elimination Program

Capital Cost	$13.3 million
Conversion Expense	4.9 million
Total Cost	$18.2 million

[Continued]

VI.

THE DECISION TO UPGRADE CERTAIN CENTRAL OFFICES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission approved the expenditure of a portion of SWB's surplus cash for upgrading fourteen "central offices" listed in one of Staff's exhibits.[29] The State and AARP contend that the decision to improve *these particular facilities* lacks evidentiary support. We agree.

None of the parties challenges the Commission's finding that "[c]entral [o]ffice upgrades will improve the quality of service . . . and increase the level of technology available to customers. . . ." Nor is there any clear denial that modernization is generally needed. The fatal weakness in the Commission's choice of facilities lies in *undisputed* testimony that Staff's "Project Priority List"—upon which the Commission relied—was presented as "simply a listing of projects that one might consider." Staff's list of priority upgrade projects differed from that

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[28] [Continued]

"II. The remaining balance plus interest accruing from the date of this order shall be invested in central office service upgrades. "The Party Line Elimination Program shall begin immediately. Staff shall monitor the progress and the costs of the Program, and SWBT shall submit quarterly reports to Staff as to the progress and costs expended until completion of the Program. SWBT shall also perform any necessary conversion of modifiable customer telephone sets. Customers shall not be charged for the costs of modifications. Such costs shall be included in the cost of the upgrade programs. The Commission directs the Company to file appropriate tariffs to accomplish this party line elimination program."

[29] A "central office" is "[a] switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building." 47 C.F.R. Part 36, App. at 581.

of SWB. Moreover, a witness for Staff even understood that a separate hearing would be held to evaluate the central offices slated for upgrading. In light of these admissions, it is no wonder that the Commission's order contains no reference to any specific information that could provide a basis for upgrading the listed central offices.

The Commission's order regarding the upgrade of Staff's proposed list of central offices hence cannot be sustained. A hearing should be conducted on remand to determine specifically *which* central offices are most in need of improvement or modernization.

VII.

THE COMMISSION'S ENLARGEMENT OF ITS INQUIRY TO INCLUDE CONSIDERATION OF CHANGES IN SWB'S BUSINESS OPERATIONS IN THIS PROCEEDING DOES NOT CONSTITUTE REVERSIBLE ERROR

AARP complains that since the proceeding before the Commission had been initiated solely to inquire into the impact of the Tax Reform Act of 1986 upon Oklahoma public utilities, the Commission impermissibly expanded the scope of its probe when it allowed SWB to present evidence of changes in its business operations. We disagree. The error urged here was not accompanied by a showing that AARP had been prejudiced by the inquiry's expansion. AARP makes no showing of this kind.

AARP urges that the Commission erred by failing to disregard "known and measurable changes in SWB's business operations." Had SWB's accumulation of surplus cash not been attributable to a tax law change but instead was caused by some other factor, i.e., a significant drop in the price of "energy", SWB would still benefit from the surplus. Under those circumstances as well as under the facts in this case it would *be inherently unfair*

for the Commission to consider the surplus income in total separation or isolation of other utility needs.

In any event AARP has failed to show that the issues joined by SWB are *not* intertwined with the other elements which bear upon the rate structure. The scope of the Commission's inquiry was sound from legal, accounting and economic points of view. We hence conclude that the Commission did not abuse its discretion by considering evidence of changes in SWB's business operations in conjunction with its inquiry's original stated purpose.

VIII.

THE COMMISSION'S FINDING OF A DEPRECIATION RESERVE DEFICIENCY LACKS SUBSTANTIAL EVIDENTIARY SUPPORT

The State's prime contention in this appeal, which is also included in AARP's assignments of error, is that the Commission's finding of a deficiency in SWB's depreciation reserve not only lacks any foundation in substantial evidence but also is unsupported by *any* evidence at all.[30] Among the "known and measurable changes" pertaining to business operations, the Commission considered SWB's depreciation reserve and found that a deficiency exists in

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[30] Decisions by the Corporation Commission may be vacated if they lack the support of "substantial evidence." See Art. 9 § 20, Okl. Const., whose pertinent terms provide:

> "* * *
>
> "The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving [an] . . . asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. *In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine* whether the Commission has regularly pursued its authority, and *whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.*" (Emphasis added.)

the amount of $180 million. For the reasons to be stated, we reverse this portion of the Commission's order.[31]

"Depreciation reserve" refers to

> "an accounting technique whereby a fund is built up from annual contributions, as an item of expense of operation, over a period of time representing the service life of a public utility plant to offset and to equal in value the ultimate total loss through use of the utility property so that at the end of such service life the depreciation reserve fund will replace the property so worn out by the various factors of depreciation." [32] (Citation omitted.)

A deficiency in the depreciation reserve is hence generated when the useful life of the property is unexpectedly reduced. In the words of the Commission a depreciation reserve deficiency "arises when depreciation rates previously established for plant and equipment become inadequate due to technological or physical obsolescence of the plant and equipment." In the scheme of rate structure, depreciation is an allowance given to SWB, *i.e.*, an operating expense,[33] by which the cost of an investment may be recovered through the rates charged.

If, for example, the useful life of an item of equipment had initially been predicted to be 10 years, but its life expectancy is later found to be no more than 6 years, then the rate base would be reduced faster than initially planned. The result is an increase in current operating

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[31] The State and AARP also contend that the Commission abused its discretion by treating the depreciation reserve deficiency as a debt and amortizing it over a four-year period. Because we reverse the Commission's finding that such a deficiency exists, we need not address the amortization issue.

[32] *Off. of Consumers' Council v. P.U.C. of Ohio*, 6 Ohio St.3d 405, 453 N.E.2d 584, 585-586 (1983).

[33] *Turpen v. Oklahoma Corp. Com'n*, *supra* note 20 at 1316 n. 7.

expenses, which could warrant an increase in rates charged to customers. As an asset depreciates over time in accordance with a schedule (*or rate*) that is based on an estimate of the asset's useful life, the rate base is reduced. A reduced rate base, in turn, means a decreased return on the investment. In short, when equipment becomes either less useful or obsolete, the schedule of depreciation becomes inadequate. This, in turn, gives rise to a deficiency in depreciation reserve. The question for us to resolve here is whether the Commission's finding that SWB has a depreciation reserve deficiency is supported by substantial evidence. This we answer in the negative.

The record reveals, and there is no question, that the Commission's reserve deficiency finding is based upon the testimony of a single Staff witness. According to the Commission's order, "[t]he amount of the depreciation reserve deficiency *was established for SWB at the 1986 Three-Way Meeting* wherein SWBT, Commission Staff and the FCC [Federal Communications Commission] staff met together for the purpose of *discussing* depreciation rates for SWBT." (Emphasis added.) Staff's witness "fully participated in this three-way process . . . [where] *Staff* reviewed the depreciation rates for each account and the reserve imbalance *which the FCC had verified to exist* through the use of computer programs which analyze data supplied by SWB. Staff's calculations took into account a total state reserve deficiency of $180 million." (Emphasis added.) So noted the Commission.

As a result of this meeting *the FCC* determined that a depreciation reserve deficiency exists. Although the Commission may have, in SWB's words, "made its own independent decision" regarding reserve deficiency, we conclude that the ruling at hand consists of no more than a decision *to agree with the FCC's determination that a deficiency exists.*

SWB admits in its brief that "Staff [had] recommended to the Commission the depreciation reserve deficiency

amount only after being furnished with and reviewing capacious records related to SWBT in Oklahoma. This process included presentation of voluminous depreciation data (binders) *to the FCC . . . .*" (Emphasis added.) Although SWB relies heavily upon the notion that this evidence is undisputed, *none of this data was tendered for the Commission's own consideration.* It is also undisputed that the Commission relied upon *its Staff's participation* in the Three-Way Meeting and that its Staff had *there* relied upon *the FCC's assessment* of data and records *which SWB had voluntarily supplied.* In addition, the Commission approvingly observed in its order that "[*S*]*taff* had the opportunity to review the audit *conducted* by the FCC and was satisfied concerning its accuracy." [34] (Emphasis added.)

Staff urges that its witness provided expert testimony upon which the Commission could rely in making its factual determination that a depreciation reserve deficiency exists. We reject the notion that there is an "evidentiary" foundation upon which the Commission's finding is grounded, since it considered no specific data or documentation that could satisfy the "substantial evidence" standard.[35]

The evidence upon which the Commission based its finding consists of expert testimony about data *dehors the record.* This is no substitute for the *Commission's own*

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[34] Staff and SWB had stipulated early in the proceeding that an audit was necessary. Yet rather than take steps to inspect SWB's records, Staff, and eventually the hearing officer and the Commission, all relied upon the FCC's findings, which were derived from data that SWB voluntarily produced *for the FCC's consideration* at the Three-Way Meeting.

[35] "Substantial evidence" possesses substance and is consequential; it denotes "fitness to induce conviction." *Pannell v. Farmers Union Co-operative Gin Ass'n,* 192 Okl. 652, 138 P.2d 817, 818-819 (1943); *Turpen v. Oklahoma Corp. Com'n, supra* note 20 at 1317.

assessment of evidence before it. Indeed, not even the common law's "summary rule," now codified in 12 O.S. 1981 § 3006,[36] can cure this defect in proof. The summary rule permits an expert to summarize a mass of data and reports before the court. Testimony of this nature is admissible even though its basis, *i.e.*, the mass of materials, has not been admitted into evidence.[37]

Had the summary rule been invoked by the evidence's proponents, *the raw data's availability would have been required for inspection by the opposing party.* Without question the raw data upon which the witness relied here was neither tendered nor made available otherwise in the course of proceedings before the Commission.[38] In short, because the summary rule's sound application presupposes the existence of an underlying pool of raw data before the tribunal and hence available for examination

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[36] The terms of 12 O.S.1981 § 3006 provide:

"The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, *summary or calculation.* The originals, or duplicates, *shall be made available for examination or copying, or both, by other parties at a reasonable time and place.* The judge may order that they be produced in court." (Emphasis added.)

[37] *Suttle v. Chadwell*, 196 Okl. 298, 164 P.2d 880, 882 (1946) (the court's syllabus ¶ 5).

[38] See *State v. Southwestern Bell Tel. Co.*, Okl., 662 P.2d 675, 681 (1983), where this court held that "*due process* and the requirement of full hearing do[es] not preclude . . . a fact finding agency [from considering] . . . evidence and conclusions reached in proceedings not conducted in the personal presence of the [agency's] members . . . *provided that the individual members of the fact finding agency . . . making [the] . . . determination . . . consider[s] and appraise[s] the evidence which justified the conclusions reached by the fact finder made outside the presence of the determining body.*" (Emphasis added.) There is no dispute in the instant case that the Commission considered *none* of the specific information that had been before the FCC.

during the proceeding—and nothing less will suffice—it affords no safety net for the Commission's finding.[39]

Nor do the terms of 75 O.S.1981 § 310(4)[40] dispense with the need for either the Commission's own assessment of data or the latter's availability at the proceeding. Section 310(4) provides that "notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." Although the terms of this section of the Administrative Procedures Act, 75 O.S.Supp.1990 § 250 *et seq.*, do not apply to the Com-

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[39] In this appeal SWB also urges that the Commission arbitrarily, and hence erroneously, "froze"—at the October 1986 levels—the separations factors *applicable to depreciation reserve deficiency alone.* The term "separations" describes "[t]he process by which telecommunications property costs, revenues, expenses, taxes and reserves are apportioned . . . [between state and interstate business]." 47 C.F.R. Part 36, App. at 585; 47 C.F.R. § 36.1(b). *Because today we reverse the Commission's finding that a depreciation reserve deficiency exists, we need not consider SWB's quest for corrective relief regarding separations factors.* Indeed, we should withhold our review of the formula applied by the Commission for allocating depreciation reserve deficiency, if any does exist between state and interstate facilities. By the time a hearing on remand is conducted there may be new separations standards to apply. *This court will not anticipate the existence of a fact; nor will it forecast an appellate response to a fact not yet of record.*

[40] The terms of 75 O.S.1981 § 310(4) provide:

> "(4) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties *shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.* The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." (Emphasis added.)

mission,[41] the minimum standards of due process embodied in § 310(4) nonetheless do.[42] In any event, the record does not indicate the Commission, however informally, took "notice" of the FCC's findings and invited the opposing parties to meet the extra-record material by rebuttal. Rather, the Commission simply *adopted* a mass of proof without the benefit of a proper predicate. Moreover, the extra-record "facts" described by the testimony as supportive of the depreciation reserve deficiency finding would not necessarily qualify as "generally recognized technical facts."

IX.

THE COMMISSION SHOULD HAVE CONSIDERED SWB'S SEVERANCE PAY EXPENSES

Among the factors SWB pressed for consideration by the Commission was severance pay expense. Although Staff had earlier agreed with SWB that $4.7 million is an appropriate sum to be included in calculating the utility's revenue requirement, Staff nevertheless excluded it from their proposal. The Commission also chose to disallow SWB's severance pay expense. On this point we reverse.

According to the Commission's order, Staff's treatment of severance pay was correct "*because Staff was unable to verify annualized wage levels* due to the methodology that SWBT uses to track its Oklahoma labor costs."

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[41] See 75 O.S.Supp.1990 § 250.4(B)(4), whose terms provide:

"B. As specified, the following agencies or classes of agency activities are not required to comply with the provisions of Article II of the Administrative Procedures Act [75 O.S.Supp. 1990 § 309 *et seq.*]:

"* * *

"4. The Oklahoma Corporation Commission; * * *"

[42] See *Teleco, Inc. v. Corporation Com'n*, Okl., 653 P.2d 209, 214 (1982); *C.F. Braun & Co. v. Corporation Commission*, Okl., 609 P.2d 1268, 1273-1274 (1980).

(Emphasis added.) This explanation, though uncontroverted, leaves us with no doubt that the Commission's decision in this regard is arbitrary and hence cannot be sustained.

The basis for disallowing severance pay expense is not questioned by any party. The State, AARP and Staff all agree that SWB either failed or was unable to supply Staff with a "labor-tracking mechanism," that is, audit information for allocating wage and non-wage data between state and interstate jurisdictions. While SWB does not deny this, none of its opponents has offered any explanation as to how an allowance for severance pay expenses is dependent upon a labor-tracking audit. Neither have we been offered a reason to doubt SWB's assertion that

> "the breakdown of each regulatory account between wage and non-wage data does *not* mean that SWBT has non-verifiable or non-auditable severance pay expenses. Total payroll expenses for Oklahoma employees, and total severance pay expenses are easily audited, and were verified by Staff. The verifiability of these expenses does not depend on being able to go to the regulatory account for maintenance expenses, for example, and break down that account between wage and non-wage data. That type of breakdown has nothing to do with the keeping of records relating to severance pay, which Staff in fact audited."

SWB's failure or refusal to produce records, data or other information can make it subject to the Commission's contempt or other coercive powers.[43] These cir-

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[43] See Art. 9 § 19, Okl. Const., *infra;* 117 O.S.1981 §§ 2 and 153, *infra.*

The pertinent terms of Art. 9 § 19, Okl. Const., provide:

> "*In all matters* pertaining to the public visitation, regulation, or control of corporations, and *within the jurisdiction of the Commission, it shall have the powers and authority of a court*

cumstances are no substitute for having substantial evidence in support of an order. The Commission's disallowance of SWB's severance pay expense must hence be disapproved on the present record, subject to further consideration on remand.

X.

THE COMMISSION MISCALCULATED SWB'S CASH WORKING CAPITAL

The next issue involves the Commission's computation of SWB's "cash working capital" requirement. Cash working capital refers to the amount of cash needed from

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of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, *and to enforce compliance with any of its lawful orders or requirements . . . .*" (Emphasis added.)

The pertinent terms of 17 O.S.1981 § 2 provide:

"*In case of failure of any corporation,* person or firm *to obey or comply with any order or requirement of the Corporation Commission, the Commission may punish* such corporation, person or firm, as *for contempt.* Such contempt proceedings may be instituted by any citizen of this state, or other parties affected by such order, by filing an affidavit with the Corporation Commission, setting forth the acts of omission or failure to comply with such order or requirement. * * *" (Emphasis added.)

The terms of 17 O.S.1981 § 153 are:

"In addition to the powers enumerated, specified, mentioned or indicated in this act, *the Commission shall have all additional implied and incidental powers* which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned, or indicated, and *to punish as for contempt such corporation,* association, company or individual, their trustees, lessees, receivers, successors and assigns, *for the disobedience of its orders in the manner provided for punishment of* transportation and *transmission companies* by the Constitution and laws of this state." (Emphasis added.)

the utility's own funds to meet current obligations as they arise during the lag period between services rendered and collection of revenues.[44] Using a "modified formula approach" the Commission found that SWB had a *negative* cash working capital requirement, which indicates the utility needs no cash to sustain its operations between the time services are rendered and the time payment for them is received. SWB contends the opposite—that it has a *positive* cash working capital requirement and hence needs cash during this period. SWB claims that its conclusion is based upon the Commission's own "modified formula approach," while the State, AARP and Staff maintain that it is based upon a flawed "lead-lag" study.[45] SWB submits that the only reason it offered the lead-lag study was because its availability was mandated by the Commission during SWB's previous rate-making case.

According to SWB, the Commission's calculations are flawed because Staff based its approach on an "instant receipt" assumption—namely that revenues are received on the date of billing. We are told this assumption is erroneous because (1) bills are not mailed to customers until one week after the billing date and (2) there is a lag period of approximately twenty-five days from the date of the bill to the date of payment.

While it is not clear from the record whether Staff actually used the "instant receipt" assumption in its cal-

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[44] *Boise Water Corp. v. Idaho Public Util. Commission*, 97 Idaho 832, 555 P.2d 163, 166 (1976); *City of Pittsburgh v. Pennsylvania Public Util. Com'n*, 370 Pa. 305, 88 A.2d 59, 61 (1952); *Southern New England Tel. Co. v. Public Util. Com'n*, 29 Conn. Supp. 253, 282 A.2d 915, 921 (1970); *Anaheim, Riverside, etc. v. Fed. Energy Reg. Com'n*, 669 F.2d 799, 805 (D.C.Cir.1981).

[45] "A lead-lag study divides the total adjusted operating expenses for the test year by the number of days in the year to arrive at an average daily expense requirement. That figure is then multiplied by the average resale class revenue lag time (in days) to yield an actual working cash requirement." *Anaheim, Riverside, etc. v. Fed. Energy Reg. Com'n, supra* note 44 at 805.

culations, Staff's approach at least appears to lack a basis in substantial evidence. SWB does not challenge Staff's use of the "modified formula approach," though the Commission did fail to specify the particular factors it employed. Neither did it state whether it considered the lag in rendition of services and receipt of payment therefor. Moreover, the briefs direct us to no evidence of how Staff's calculations resulted in a negative cash working requirement, while SWB, using the same "modified formula approach," arrived at a positive cash working capital requirement. Because the Commission's determination of SWB's cash working capital requirement is not sustained by substantial evidence, we disapprove of this part of its order and remand the issue to the Commission for further consideration.

XI.

THE COMMISSION'S DECISION NOT TO CONSIDER INTEREST ON SWB'S EXCESS DEFERRED INCOME TAXES WILL NOT BE DISTURBED

The State and AARP contend that the Commission erred by failing to charge interest on SWB's excess deferred income taxes. Because the briefs fail to provide us with a record-supported argument that would defeat the basis for the Commission's decision, we must affirm.

The hearing officer's report explains that "[e]xcess deferred income taxes are the result of timing differences between tax expenses charged for books and taxes payable to the state and federal governments. Any differences are accumulated in the deferred income tax balance and are deducted from rate base until the taxes are actually paid to the government."

Here, SWB collected from the ratepayers sums sufficient to satisfy the 46% income tax rate but paid taxes for 1987 at 40% and at 34% in 1988 and the prospective year. An excess is thus created because the deferred

tax balance became greater than the amount of taxes actually paid. The Commission decided that it would not be appropriate in this case to charge interest for SWB's excess deferred income taxes. This is so because ratepayers are benefited when the excess is deducted from the rate base, thus lowering the revenue requirement. According to the hearing officer's report, charging this interest would result in a substantial revenue deficiency, and consequently, the need to raise telephone rates.[46]

The AARP contends that this decision is erroneous because, in their view, "[i]f the Commission would immediately refund to the ratepayers who paid the deferred income taxes, these ratepayers could immediately deposit the money in the bank and draw interest on it."[47] The AARP also contends that there is no substantial evidence the ratepayers will receive any benefit by SWB's retention of the excess deferred income taxes, as the Commission has permitted.[48]

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[46] The evidence upon which the Commission relied includes testimony from the following witness as summarized in the hearing officer's report:

> "[Shirley Norman:] Even though the unprotected excess deferred income taxes are proposed to be flowed back to the ratepayers over two years, and the unprotected excess deferred income taxes are to be flowed back pursuant to ARAM, *all of the excess deferred income taxes will eventually be flowed back to the ratepayers. If Staff hadn't reduced SWB's rate base by the amount of excess deferred income taxes, there would have been a very large revenue deficiency in each of the three test periods used in this case.* The 1987 revenue deficiency would have been $38.4 million, the 1988 revenue deficiency would have been $22.8 million, and the prospective revenue deficiency would have been $28.7 million. However, *by reducing SWB's rate base by the $63.2 million excess deferred income taxes amount, a revenue excess for each of the three test periods results.*" (Emphasis added.)

[47] The quoted text is excerpted from AARP's brief.

[48] The State does not join in AARP's complaint regarding interest on excess deferred income taxes.

Every finding of the Corporation Commission made in matters it frequently adjudicates and in which it possesses expertise is accompanied by a presumption of correctness if supported by substantial evidence.[49] Although AARP did present expert testimony favoring its position,[50] the Commission's decision is nonetheless supported by substantial evidence. Moreover, upon this point AARP's brief offers no clear basis for overcoming the law's presumption of correctness that attaches to the Commission's decision. We hence leave that part of the order undisturbed.

AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS PRONOUNCEMENT.

LAVENDER, SIMMS, DOOLIN, HARGRAVE and ALMA WILSON, JJ., concur.

KAUGER and SUMMERS, JJ., concur in result.

HODGES, V.C.J., disqualified.

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[49] *Teleco, Inc. v. Corporation Com'n, supra* note 42 at 212; *Turpen v. Oklahoma Corp. Com'n, supra* note 20 at 1317.

[50] According to one of AARP's witnesess, Joseph William Mihuc, whose testimony is summarized in the hearing officer's report,

> "interest should accumulate on the excess deferred income taxes to compensate the ratepayers for advancing payment to pay the taxes. All taxes collected from the ratepayers, but not currently refunded, should continue to accumulate interest until refunded. The excess deferred income taxes should be deducted from SWB's rate base and amortized and returned to the ratepayers along with interest at SWB's authorized rate of return, 11.85%.
>
> "The flow back of unprotected excess deferred income taxes should be made to the ratepayers in the form of a cash refund as soon as possible."

APPENDIX D

CONSTITUTION OF THE STATE OF OKLAHOMA
ARTICLE IX. CORPORATIONS
CORPORATION COMMISSION

§ 15. Creation—Terms of office—Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: Provided, Corporation Commissioners first elected under this Constitution shall hold office as follows: One shall serve until the second Monday in January, nineteen hundred and nine; one until the second Monday in January, nineteen hundred and eleven; and one until the second Monday in January nineteen hundred and thirteen; their terms to be decided by lot immediately after they shall have qualified. In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

§ 16. Qualifications of commissioners

The qualifications of such commissioners shall be as follows: To be resident citizens of this State for over two years next preceding the election, and qualified voters under the Constitution and laws, and not less than thirty years of age; nor shall such commissioners, or either of them, be, directly or indirectly, interested in any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, operated for hire, in this State, or out of it, or any stock, bond, mortgage, security, or earnings of any such railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, compress or elevator companies; and if such Commis-

sioner shall voluntarily become so interested, his office shall become vacant; and if any Corporation Commissioner shall become so interested otherwise than voluntarily, he shall, within a reasonable time, divest himself of such interest; and failing to do this, his office shall become vacant. Nor shall any such commissioner hold any other office under the government of the United States, or of this State, or any other state government, and shall not, while such Commissioner, engage in any occupation or business inconsistent with his duties as such commissioner.

§ 17. Oath of office—Additional oath

Before entering upon the duties of his office, each of said commissioners shall take and subscribe to the oath of office as prescribed in this Constitution and shall, in addition thereto, swear that he is not, directly or indirectly, interested in any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, nor in the bonds, stocks, mortgages, securities, contract or earnings of any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line; and that he will, to the best of his ability, faithfully and justly execute and enforce the provisions of this Constitution, and all the laws of this State concerning railroads, street railways, traction lines, canals, steam boats, pipe lines, car lines, sleeping car lines, car associations, express lines, telephone and telegraph lines, compress and elevator companies, and all other corporations over which said Commission has jurisdiction, which oath shall be filed with the Secretary of State.

§ 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transporta-

tion, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published one time in substance in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed general order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall im-

pair the rights which have heretofore been, or may hereafter be, confererd by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

§ 19. Powers of court of record—Additional powers—Failure or refusal to obey orders

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed

by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

§ 20. Appeals to Supreme Court—Other courts to have no jurisdiction—Mandamus and prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Suprme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right,

and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States of the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Com-

mission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF AMICUS, PROFESSOR BERNARD SCHWARTZ, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Whether the Supreme Court of Oklahoma may decline to be bound by the decisions of this Court interpreting the Due Process Clause of the Fourteenth Amendment and hold, despite those decisions, that a regulatory agency member may never be disqualified for bias in a ratemaking proceeding.

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No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

— v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF AMICUS, PROFESSOR BERNARD SCHWARTZ, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

I am not representing a client, and the views expressed in this Petition are my own. I have no monetary interest in this or any other ratemaking case (though I am a customer of Petitioner). Aside from wishing to assist the Court, my interests in the case are entirely academic. I am the Chapman Distinguished Professor of Law at the University of Tulsa College of Law. I have taught administrative law since 1947, both at New York University and the University of Tulsa. I am author of a treatise and a casebook on administrative law – ADMINISTRATIVE LAW (Little Brown, 3d ed. 1991); ADMINISTRATIVE

LAW: A CASEBOOK (Little Brown, 4th ed. 1994) – as well as numerous articles on the subject.[1]

ARGUMENT

The Oklahoma Supreme Court's decision in *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, 873 P.2d 1001 (Okla. 1994), violates basic constitutional and administrative law principles. Its cavalier disregard for that fundamental principle of due process – a "fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) – warrants this Court's review and reversal. The Oklahoma Court's conclusion that particularized ratemaking is "legislative" in nature, and, therefore, without need of an impartial decisionmaker ignores the reality that particularized ratemaking affects and is directed toward specific persons in specific factual settings; it is not an exercise of general policy making authority. The fatal flaw in the Oklahoma Court's logic is that it allows an historical label – ratemaking is legislative – to dictate the parameters of the procedural requirements without inquiry into the nature of the ratemaking proceeding.

This amicus brief will address two issues: 1) the applicability of the due process requirement of an impartial decisionmaker in a particularized ratemaking proceeding; and 2) the inapplicability of the Rule of

[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of this Court.

Necessity where a quorum of the decisionmaking body remains after one member is disqualified for bias.

I. THE OKLAHOMA SUPREME COURT'S DECISION VIOLATES DUE PROCESS BECAUSE IT FAILED TO REQUIRE AN IMPARTIAL AND UNBIASED DECISIONMAKER IN A PARTICULARIZED RATE-MAKING PROCEEDING.

The Fourteenth Amendment mandates that any individualized state deprivation of property be preceded by "due process." An unbiased tribunal lies at the core of the due process requirement; it has, indeed, been characterized as "[o]ne of the very objects of Law." *Liteky v. United States,* 114 S.Ct. 1147, 1158 (1994) (Kennedy, J., concurring in judgment). *See e.g. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.,* 113 S.Ct. 2264, 2277 (1993) ("Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator); *Withrow v. Larkin,* 421 U.S. 35, 46 (1975) ("a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies as much to administrative agencies which adjudicate as to courts"); and *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) ("of course, an impartial decisionmaker is essential).[2] From the dawn of the modern administrative state,

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[2] *See also e.g., National Labor Relations Board v. Phelps,* 136 F.2d 562, 563 (5th Cir. 1943) (right to an unbiased adjudicator is the essence of due process and may be even more important in agency adjudications where other procedural safeguards may have been relaxed); and *General Motors Corp. v. Rosa,* 624 N.E. 2d 142, 144 (N.Y. 1993) ("The participation of an independent, unbiased adjudicator . . . is an essential element of due process," fully applicable to administrative proceedings). Many

the courts have applied these principles to administrative agencies; including those engaged in ratemaking. *See e.g., Spring Valley Water-Works v. Schottler,* 110 U.S. 347, 354 (1884) (municipal agency charged with setting water rates had "duties [that] are judicial in nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination." This includes "the principle that no man shall be judge in his own cause," *Ibid,* and the requirement of "an impartial tribunal," *Id.* at 383, Field, J., dissenting).

Indeed, the Oklahoma Supreme Court acknowledges as much. For the Oklahoma Court, the distinction between adjudication and rulemaking and the placement

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commentators have also recognized the pivotal importance of an unbiased tribunal to meeting the demands of due process. *See e.g.,* II KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE Sec. 9.8 (1994) ("Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking"); Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. REV. 1067, 1143 (1992) ("An essential element of adjudication is that a decisionmaker be impartial); BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 6.17 (3d ed. 1991) ("Due process requires an impartial tribunal to ensure a fair hearing before a neutral and unbiased decision-maker"); Martin Redish and Lawrence Marshall, *Adjudicatory Independence and the Values of Due Process,* 95 YALE L.J. 455, 475 (1986) ("It is our position that the participation of an independent adjudicator is such an essential safeguard, and may be the only one."); and Henry Friendly, *"Some Kind of Hearing,"* 123 PENN. L. REV. 1267, 1278-79 (1975) ("there is wisdom in recognizing that the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards").

of ratemaking within the latter category was "determinative of the issue presented, for . . . proceedings which are legislative in nature do not implicate judicial process and do not require application of [ ] judicial standards." 873 P.2d at 1005. The Oklahoma Court's error was that it allowed labels and not the nature of the proceeding to dictate the parameters of due process.[3]

The implication of the due process guarantee depends upon the nature of the proceeding not its historical and artificial label. As this Court has recognized, the characterization of ratemaking as rulemaking, *see e.g., New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989) (exploring the contours of the *Younger* abstention doctrine) is not dispositive of the due process issue. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 206 (1937), the Court said: "The fundamentals of a *trial* were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." *Id.* at 300 (emphasis added).[4] In reversing the decision of the Ohio Supreme Court upholding

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[3] Ironically, Oklahoma administrative law does not juxtapose "rulemaking" and "adjudication", preferring instead the labels "rulemaking" and "individual proceeding" for the very purpose of excising ratemaking from "rulemaking." *Compare* OKLA STAT. tit. 75, Sec. 250.3(2)(b) (West Supp. 1994) ("Rule . . . does not include: . . . the approval, disapproval or prescription of rates") *with id.* at Sec. 250.3(6) (individual proceeding). *See infra* at 9.

[4] Like *Ohio Bell*, the instant case involved a rate proceeding where the regulatory body was to determine the extent of a refund to utility customers.

the Commission's rate order, the Court said that especially in these quasi-judicial administrative proceedings "the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Id.* at 304-305 (citations omitted).

This Court, in *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973), citing *Ohio Bell* along with *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), established guidelines for determining when an agency proceeding is judicial in nature for purposes of due process analysis. The Court said that its "decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." 410 U.S. at 245.[5] The particularized

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[5] [T]he most frequently used test to distinguish [rulemaking and adjudication] is that of time: Judicial power determines the rightfulness of acts done; legislative power prescribes the rules for acts to be done. . . . Even if agency action is legislative under the time test, if it is particular in its applicability, its effect may be much the same as that of an adjudicatory decision. . . . If the administrative process is directed at particular persons – even if it be termed rulemaking – those affected should be given the same hearing rights as in proceedings that are clearly judicial in nature.

ratemaking of *Ohio Bell*, where the "fundamentals of a trial" were required, was distinguished from "across the board" or generalized rate orders, which involved "the formulation of a basically legislative-type judgment." *Id.* at 245-46. *See also Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978) ("even in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process"); and *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63, 70 (1935) ("fundamentals of a fair hearing" must be afforded utilities in particularized rate cases).

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") followed the Court's teaching that a quasi-judicial or adjudicative tone inheres in particularized ratemaking proceedings. The NCCUSL has adopted three Model State Administrative Procedure Acts: in 1946, 1961, and 1981. Each model act excises

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BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 5.8 (3d ed. 1991). *See e.g.*, II KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE Sec. 9.2 (1994) ("The Due Process Clause requires a hearing of some kind only when government deprives an individual of 'life, liberty, or property' based on resolution of contested factual issues concerning that individual. . . . The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system").

particularized ratemaking from the rulemaking nomenclature, placing it, instead, within the adjudicative rubric. The 1961 Model Act, which was adopted with modification in Oklahoma, clearly treats ratemaking as adjudicative in nature. It defines "contested case"[6] as "a proceeding, including but not restricted to ratemaking,[7] . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) (1961).[8] In

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[6] "The term 'contested case' is used in the Model Act, instead of the word 'adjudication' as found in the Federal Act, to avoid the possible confusion in terminology that might result from the fact that *ratemaking* under the Federal Act is classified as 'rule making' with special procedures applicable to it, whereas under the Model Act it is desired to apply the contested case procedures to ratemaking." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) commentary at 11 (1961).

[7] The NCCUSL had intended to include particularized "ratemaking" within the definition of "contested case" in 1946 when it defined that term as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(3) (1946). The 1961 Model Act made this explicit because courts, on occasion, had erroneously treated ratemaking as a rulemaking proceeding under the 1946 Act; "[t]he real purpose of it is to evade the possibility of other courts following that unfortunate precedent." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Proceeding in the Committee of the Whole, August 23, 1960, at 8 (comments of Professor Merrill).

[8] The 1981 Model Act is more nuanced in its distinction between an agency's quasi-legislative and quasi-judicial functions. It defines "Order" as "an agency action of particular applicability" affecting "one or more specific persons." MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1-102(5) (1981). In

adopting the 1961 Model Act in modified form, Oklahoma explicitly excluded ratemaking from rulemaking: " 'Rule' . . . does not include: . . . b. the approval, disapproval or prescription of rates." *See* OKLA STAT. tit. 75, Sec. 250.3(2)(b) (West Supp. 1994). The purpose of this provision was to make clear that "a modern rate fixing proceeding, with its specified parties, its adversary procedure . . . preeminently is adjudicative." Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 9 (1964).

Although the Oklahoma Corporation Commission is not bound by the Oklahoma Administrative Procedures Act,[9] the Oklahoma constitutional provisions creating the Commission recognize the distinction between particularized and generalized fact finding and determination. "Before the Commission shall prescribe or fix any rate . . . directed against any one or more companies by name, the company or companies to be affected by such rate . . . shall first be given notice . . . and shall be afforded a reasonable opportunity to introduce evidence and be

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contrast, "Rule" is defined as "an agency statement of general applicability." *Id.* at (10). Particularized ratemaking requires an "Order" and ratemaking of general applicability can be created by "Rule."

[9] "[P]ractical politics" exempted the Corporation Commission from the Oklahoma APA. *See* Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 4 (1964). For Merrill, excluding the Corporation Commission was not cause for too great an alarm because the Commission "operate[s] under very fully developed and sophisticated procedures. . . . The [APA] provides minimal standards of fair procedure. A large part of the procedural requirements of [the Corporation Commission] go beyond these minima." *Id.*

heard thereon, to the end that justice may be done." OKLA. CONST. art, 9, Sec. 18. In contrast, in the process for promulgating "any general order, rule, requirement, not directed against any specific company or companies by name" only newspaper notice with a general opportunity to object is all that is required. *Id.* The Oklahoma Constitution and the Oklahoma statutes reflect the correct understanding that agency action of particular applicability, including ratemaking, implicates constitutional due process concerns.

Academia also recognizes ratemaking's duality; when the ratemaking process leads to an "Order" of general applicability, it is legislative in nature, but when it leads to an "Order" directed at one or few entities, it is essentially adjudicative in function.

> Ratemaking . . . is normally particular in applicability since it involves the fixing of prices to be charged utilities. When an agency fixes the rates charged by an electric utility, where there is only one company whose rates are being fixed, the impact on the company is virtually that of a *judicial decision*, and it has a *due process* right to be heard. Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency as opposing parties who can best present their sides in a *trial-type* format.
>
> The same is not true when rates are general rather than particular in applicability . . . in which the separate fact pattern of each member of the class was not evaluated.

BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 5.8 (3d ed. 1991).

In accord with this Court's cases, when the Oklahoma Corporation Commission sits in judgment to determine the amount of refund Southwestern Bell must give to its customers, the Commission is engaged in a judicial type decision. In the words of this Court, in setting rates "their duties are judicial in nature." *Spring Valley Water-Works v. Schottler,* 110 U.S. at 354. It follows that in ratemaking, as in purely adjudicatory proceedings, Southwestern Bell "was entitled to an impartial decisionmaker." *Michigan Intra-State Motor v. PSC,* 504 N.W.2d 677, 682 (Mich. App. 1993). Indeed, the Oklahoma Supreme Court's decision to the contrary stands alone. For other recent cases, *see Business and Professional v. Barnich,* 614 N.E.2d 341, 345 (Ill. App. 1993); *New England Tel. & Tel. Co. v. PUC,* 448 A.2d 272, 281 (Me. 1982). *Cf. Mass. Auto Rating & ACC v. Commissioner,* 516 N.E.2d 1132, 1141 (Mass. 1987).

The due process requirement of an unbiased decision maker is essential to providing Southwestern Bell, or any other party involved in a particularized rate case, a fair hearing. The cases are replete with instances where administrative decision makers have been disqualified for bias. *See e.g., Gibson v. Berryhill,* 411 U.S. 564 (1973); *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927); *Cinderella Career & Finishing Schools v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970) (disqualification necessary where "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case"); and *American Cyanamid Co. v. FTC,* 363 F.2d 757, 767 (6th Cir. 1966) ("It is fundamental that both unfairness and the appearance of unfairness should be

avoided"). *Cf. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277 (1993) ("Justice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial even by judges who have no actual bias. . . . [T]he possibility of bias . . . would suffice" as a bar.) (internal quotations and cite omitted).

II. The Oklahoma Supreme Court Erroneously Applied the Rule of Necessity.

In *dicta*, the Oklahoma Supreme Court said that the "Rule of Necessity" would require a biased Corporation Commissioner to sit even when performing judicial functions. 873 P.2d at 1009. The Oklahoma Court reasoned that the rule of necessity needed to be invoked because disqualification of one Commissioner would only leave two, with the possibility of a tie vote. This is simply wrong; a tie vote does not destroy the forum since two commissioners constitute a quorum. *See* Okla. Const. art, 9, Sec. 18a; *Delta Air Lines, Inc. v. CAB*, 497 F.2d 608, 615 (D.C. Cir. 1973) (2-2 vote); and *Stahl v. Board of Supervisors*, 175 N.W. 772, 776 (Iowa 1920) (rule of necessity not applicable even where remaining members may split 1-1). *Cf. Reagan v. Abourezk*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987).

Where employed, the Rule of Necessity is viewed as a necessary evil.[10] "The rule of necessity forces the

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[10] The Oklahoma "legislature has shown unequivocally its intent to repudiate the 'rule of necessity.' " Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 Okla. L. Rev. 1, 35 (1964).

individual to submit to trial before a biased adjudicator. As such, its application should be strictly confined." BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 6.20 (3d ed. 1991). The Rule of Necessity applies "if and only if the dispute cannot otherwise be heard." *General Motors Corp. v. Rosa*, 624 N.E.2d 142, 144 (N.Y. 1993). " '[N]ecessity' must be construed strictly." *Id.* at 145. Due process concerns dictate that "disqualification is the paramount policy, and is only to yield when the necessity is so great and overwhelming that there may be an entire failure of justice." *E.g., State v. Aldridge*, 103 So. 835, 838 (Ala. 1925); *Pillsbury Co. v. FTC*, 354 F.2d 952, 965 (5th Cir. 1966) (court must "seek to find a solution that guarantees a fair tribunal"); and *Jarrott v. Scrivener*, 225 F.Supp. 827, 836 (D.C. 1964) (court ordered creation of new zoning board solely for purpose of hearing matter on which the sitting Board was disqualified). The possibility of a tie vote should not stand between a party and a fair adjudication before an unbiased tribunal.

III. CONCLUSION

In short, this Court has clearly concluded that particularized ratemaking proceedings require a fair hearing, which must include an unbiased decision maker. Other courts, state legislatures, through the Model Acts, and the scholarly commentary agree. It seems painfully obvious to all but the Oklahoma Supreme Court's majority that its decision violates basic principles of administrative law. By sanctioning an agency's use of a biased decision maker in ratemaking cases, it has denied the most basic

of due process rights to all persons, individual or corporate, who find their "property" the subject of a rate hearing in Oklahoma.

For these reasons, this Court should grant certiorari and reverse the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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In The

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SOUTHWESTERN BELL TELEPHONE COMPANY,

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Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Oklahoma

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QUESTIONS PRESENTED

(1) Whether a state court's decision to deny recusal of an elected commissioner in a pending state ratemaking proceeding is ineligible for review by this Court, because the decision is not a final order; and

(2) Whether a state court complies with due process when the court denies a utility's petition to recuse a commissioner in a pending ratemaking proceeding, but will provide the utility with an opportunity, after the commission issues its rate order, for the court's review in its independent judgment to determine whether the rate order is confiscatory and whether the utility was denied the right to make a fair presentation of its case.

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No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION

The Respondent Oklahoma Corporation Commission submits this brief in opposition to the Petition for Writ of Certiorari filed by Southwestern Bell Telephone Company in the above referenced case.

STATEMENT OF THE CASE

Petitioner Southwestern Bell Telephone Company ("SWB") seriously misstates the holding of the Oklahoma Supreme Court in its Petition for Writ of Certiorari, and then builds a series of arguments on this unsound foundation. Respondent Oklahoma Corporation Commission

("Corporation Commission") therefore submits the following *Statement of the Case.*

The Corporation Commission derives its powers directly from the Oklahoma Constitution, and consists of three commissioners elected to staggered six-year terms by statewide ballot. It regulates public utilities, including Petitioner SWB. The Oklahoma Supreme Court exercises direct appellate jurisdiction over final rate orders of the Corporation Commission.

Bob Anthony was elected to the Corporation Commission in 1988, and took office in 1989. On October 2, 1992, Commissioner Anthony made a public announcement, which is set forth in the Oklahoma Supreme Court's opinion and reproduced in the appendix to the Petition ("Pet. App.") at 2a-3a. In summary, the announcement disclosed that Commissioner Anthony had worked with the Federal Bureau of Investigation since 1988 to investigate alleged corruption at the Corporation Commission; had received thousands of dollars in cash from individuals associated with regulated companies; had immediately given this cash to the FBI; and, more than a year before the announcement, had separately advised a SWB senior corporate officer and a SWB corporate attorney of the conduct of persons associated with their firm.

On the basis of this announcement, SWB sought Commissioner Anthony's recusal from a pending ratemaking proceeding (styled PUD-260) and from all pending and future SWB cases. After Commissioner Anthony declined to recuse himself and the Corporation Commission declined to override his decision, SWB sought a writ

of prohibition in the Oklahoma Supreme Court, in an attempt to compel the recusal of Commissioner Anthony.

The Oklahoma Supreme Court's first decision, rendered on May 25, 1993, granted the writ of prohibition. *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, No. 80,579, Slip. Op. (Okla. May 25, 1993), Pet. App. at 60a-74a. On April 13, 1994, however, on rehearing, the court withdrew its earlier opinion and denied the writ of prohibition. *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, 873 P.2d 1001 (Okla. 1994), Pet. App. at 1a-59a. SWB has filed a Petition for Writ of Certiorari, seeking this Court's review of the Oklahoma Supreme Court's April 13, 1994 decision.

In that decision, the Oklahoma Supreme Court discussed prior cases that characterize utility ratemaking as legislative, not adjudicative. The Oklahoma Supreme Court concluded that *judicial* standards of due process do not apply, and the writ of prohibition is not available. Furthermore, because the Corporation Commission derives its powers directly from the state constitution, the Corporation Commission is not governed by the provisions of the Oklahoma Administrative Procedures Act regarding the recusal of agency members and the appointment of temporary substitutes.

In denying the writ of prohibition, the Oklahoma Supreme Court addressed the remedies that will be available to SWB after the Corporation Commission renders a rate order. The court's statement of these remedies is part of the holding in this case, because the availability of

these remedies forms an integral part of the court's decision to deny relief at the present interlocutory stage of the pending ratemaking proceeding.

Once the Corporation Commission renders a rate order, SWB will have an opportunity to seek review in the Oklahoma Supreme Court on the grounds that (1) the rate order is unreasonable or confiscatory, or (2) SWB was prejudiced during the ratemaking proceeding by "unfair treatment and arbitrary rulings on evidence and testimony." Pet. App. at 13a. In performing this review, the Oklahoma Supreme Court "will exercise its independent judgment as to both the law and the facts." Pet. App. at 13a.

By reaffirming the availability of these remedies, the Oklahoma Supreme Court clearly demonstrated that due process applies. Substantive due process protects the utility company from the imposition of unreasonable or confiscatory rates; procedural due process guarantees the utility an opportunity to create a fair record of its case during the ratemaking proceeding, so that the reviewing court will have an adequate basis for determining whether the rate order is unreasonable or confiscatory.

The Oklahoma Supreme Court's opinion also discussed the relief that would be available against an allegedly biased commissioner if that official were exercising a *judicial* function. This discussion reached the conclusion that the rule of necessity would prevent the recusal of a commissioner who was exercising a judicial function, because no mechanism exists for the appointment of a substitute commissioner. Pet. App. at 15a. This part of the court's opinion is purely advisory to the

parties, in view of the court's determination that the ratemaking proceeding at issue in this case is legislative, not judicial.

The Petition includes SWB's protestation of innocence of any impropriety. Pet. at 3, n.1. The Corporation Commission expresses no opinion, at this stage of the proceedings, as to the culpability of any person or the source of the cash given to Commissioner Anthony. The resolution of those matters is pending in other tribunals.

The Petition is replete with erroneous interpretations of the Oklahoma Supreme Court's decision. According to SWB, for example, the question presented is "[w]hether States may deny all procedural due process protection in ratemaking proceedings, by labelling such proceedings 'legislative' and applying the Rule of Necessity." Pet. at i. Along similar lines, SWB's *Statement of the Case* in the Petition includes the assertion that "[t]he court made clear that its reasoning would compel it to deny *all* due process claims arising from ratemaking proceedings." Pet. at 7 (emphasis in original).

SWB's interpretation of the Oklahoma Supreme Court's decision is untenable. In fact, as indicated above, the Oklahoma Supreme Court clearly held that ratemaking proceedings before the Corporation Commission are indeed governed by due process. Furthermore, the Corporation Commission will demonstrate herein that the Oklahoma Supreme Court's interpretation of due process in ratemaking does not conflict with any of this Court's precedents.

This Court has not provided guidance on all details of due process that could arise in the ratemaking proceedings of state agencies. For the reasons discussed below, this case does not offer this Court an appropriate opportunity to provide additional guidance. The Petition for Writ of Certiorari should therefore be denied.

SUMMARY OF ARGUMENT

The Oklahoma Supreme Court's order in this case is not a final order under 28 U.S.C. § 1257, and is therefore ineligible for review by this Court. The Oklahoma Supreme Court issued this order during a pending ratemaking proceeding. The order denied SWB's Petition to disqualify Bob Anthony, one of the three elected members of the Oklahoma Corporation Commission. SWB will have the right of review by the Oklahoma Supreme Court after completion of the ratemaking proceeding.

Even if this Court determines that review is not completely barred for lack of finality, this Court should decline to review the portion of the Oklahoma Supreme Court opinion regarding the rule of necessity which may arise in an adjudicative proceeding in the future. This part of the decision is advisory, since the Oklahoma Supreme Court characterized the instant ratemaking proceedings as legislative, not adjudicative.

Even if this Court considers the merits, this Court should deny the Petition because the Oklahoma Supreme Court's opinion does not conflict with this Court's precedents, does not significantly conflict with the decisions of

other state courts, and correctly decides the federal constitutional issues. The Oklahoma Supreme Court will provide SWB with an opportunity, after the Corporation Commission issues its final rate order, for the court's review in its independent judgment to determine whether the rate order is confiscatory and whether SWB was denied the right to make a fair presentation of its case. The availabilty of this review satisfies the requirements of substantive and procedural due process. Further, the record contains no evidence that Commissioner Anthony had prejudged issues in the rate case.

ARGUMENT

I. THE STATE COURT'S DECISION IS NOT A FINAL ORDER AND THEREFORE DOES NOT QUALIFY FOR REVIEW BY THIS COURT.

SWB correctly cites 28 U.S.C. § 1257 as the basis for this Court's jurisdiction, but SWB makes no mention of that section's requirement that the state court's decision must be final. Because SWB does not discuss the crucial issue of finality, the Corporation Commission submits the following discussion.

A. The Oklahoma Supreme Court's decision is not eligible for review under the finality doctrine as it is applied to a decision of the highest court of a state.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), summarizes four categories of situations in which this Court has reviewed state court decisions as "final," even

though the state proceedings are not yet complete. The Oklahoma Supreme Court's decision in this case does not fall within any of these four categories.

In the first *Cox Broadcasting* category are "those cases in which there are further proceedings . . . even entire trials . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The instant case clearly does not come within this category, because the Oklahoma Supreme Court's denial of the petition to recuse Commissioner Anthony does not conclude due process opportunities for SWB or preordain the outcome of the Corporation Commission's rate-making proceeding.

In the second *Cox Broadcasting* category are cases in which the federal issue "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This category is also inapplicable to the instant case. After the Corporation Commission renders its rate order, SWB will have the opportunity to appeal to the Oklahoma Supreme Court, which may decide the case in a manner that renders unnecessary the resolution of any federal question.

In the third *Cox Broadcasting* category are "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Id.* at 481. As an example of this category, *Cox Broadcasting* refers to *North Dakota State Bd. of Pharmacy v. Snyder's*

Drug Stores, Inc., 414 U.S. 156 (1973), which held that a state court decision is "final" when the state court remands a matter to a state agency with instructions to hold the hearing "sans [the] constitutional issue." The instant case is distinguishable. SWB will have the opportunity to litigate its constitutional claims during the remainder of the pending rate proceeding before the Corporation Commission and during any subsequent review in the Oklahoma Supreme Court or in this Court.

In the fourth and final *Cox Broadcasting* category are

> [T]hose situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come . . . [and] if a refusal immediately to review the state-court decision might seriously erode federal policy. . . .

420 U.S. at 482-83. *Cox Broadcasting* itself fits into this fourth category. That case arose from a state court decision which rejected challenges, under the First and Fourteenth Amendments, to a state law authorizing damage suits against the press for publishing the name of a rape victim whose identity is revealed in the course of a public prosecution. This Court was concerned that "a failure to decide the question now will leave the press in Georgia

operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . . " *Id.* at 486. In the instant case, no such serious consequences will flow from denial of the writ at this time. The state court's decision does not conflict with any of this Court's precedents, and does not leave utilities or anyone else in the precarious position this Court described in *Cox Broadcasting*.

In summary, none of the four *Cox Broadcasting* categories applies to this case. Nor does this case qualify as "final" under *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (state court decision is "final" when it determines federal preemption issue). Therefore, this Court should deny the writ on the ground, inter alia, that the state court decision is not final. This result would be consistent with *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (state court interpreted Oklahoma Corporation Commission's order as giving the regulated party three choices, and this Court held the state court decision was not "final").

B. Finality cases involving appeals within the federal court system do not apply.

A distinction must be made between (1) the finality requirement regarding this Court's review of decisions of the highest court of a state, as interpreted by the above cases, and (2) the finality requirement regarding appeals within the federal court system.

Regarding finality category (2), this Court has allowed interlocutory review in some cases. *See, e.g., Withrow v. Larkin*, 421 U.S. 35 (1975) (petitioner filed suit

in federal district court, before agency conducted hearing on license revocation; petitioner alleged that the combination of functions in state agency violated procedural due process; this Court entertained the merits of this pre-hearing challenge, but held the state system valid). *See also Gibson v. Berryhill*, 411 U.S. 564 (1973), discussed *infra*, IV, B.2. But this Court has disallowed interlocutory review in other cases. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (federal district court order denying motion to disqualify counsel is a "collateral order" and is not subject to interlocutory review by the court of appeals).

In any event, the cases under category (2) of finality (appeals within the federal court system) appear to be based on considerations of federal judicial economy, in contrast to the cases under category (1) of finality (this Court's review of highest state court decisions), which are based on considerations of federalism and deference due state courts.

C. Finality cases involving writs of prohibition do not apply.

The instant case is also distinguishable from finality cases arising from state court proceedings on writs of prohibition, such as *Bandini Petroleum Co. v. Superior Court of California*, 284 U.S. 8 (1931) and *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) (noted in *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951)). *See also Madruga v. Superior Court of California*, 346 U.S. 556 (1954); *Fisher v. District Court*, 424 U.S. 382 (1976); *Board of Education of City of Los Angeles v. Superior Court of California*, 448 U.S. 1343 (1980) (Rehnquist, J., in chambers

opinion denying stay in state proceedings). Each of those cases arose from a state appellate court's denial of a writ of prohibition (or in the case of *Fisher v. District Court*, a writ of supervisory control). Furthermore, each of those cases indicated that a state court's decision on a writ of prohibition may be considered to be "final," even though other aspects of the case are still ongoing.

The instant case, however, is distinguishable from those cases. In all of those cases, prohibition was sought as a means of challenging the jurisdiction of a lower court to proceed. In contrast, SWB's petition to the state court for writ of prohibition was in the nature of a motion to recuse one of the three commissioners from participating in a proceeding, as noted in the Petition at 5-6. Therefore, the *Bandini/Rescue Army* doctrine does not transform the Oklahoma Supreme Court's decision in this case into a final order.

D. SWB will not suffer irreparable harm if this Court denies certiorari at the present stage of the proceedings.

SWB is not required to do anything until completion of the pending ratemaking proceedings and will have access to adequate remedies, in the form of state court review, as soon as the Corporation Commission completes those proceedings. Accordingly, SWB will not suffer irreparable harm if this Court denies the Petition for Writ of Certiorari at this interlocutory stage of the state ratemaking proceedings. Under the finality doctrine as applied to decisions of a state's highest court, absent an imminent decision in an incomplete state proceeding

which will cause an immediate detrimental impact upon property rights, this Court should deny the Petition for Writ of Certiorari and avoid intervening in the state proceeding. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124-26 (1945).

II. THE STATE COURT'S DISCUSSION OF THE RULE OF NECESSITY IS ONLY ADVISORY AND IS THEREFORE NOT REVIEWABLE BY THIS COURT.

The Oklahoma Supreme Court's discussion of the rule of necessity deals only with *adjudicative* proceedings. The Oklahoma Supreme Court held that the ratemaking proceeding in the instant case is *legislative* and therefore did not base its decision on the rule of necessity; its discussion of this issue was merely advisory and therefore not reviewable by this Court. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (this Court reviews state judgments, not statements in opinions of state courts); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (the power of this Court is to correct judgments, not to revise opinions).

III. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH ANY OF THIS COURT'S DECISIONS, AND DOES NOT SIGNIFICANTLY CONFLICT WITH DECISIONS OF OTHER STATE COURTS.

The Oklahoma Supreme Court's decision in this case does not conflict with any of this Court's precedents. The decision appears to conflict, to a limited extent, with a

small number of decisions of other state courts but this limited conflict does not warrant review by this Court.

A. The state court's decision does not conflict with any of this Court's precedents.

According to SWB, the Oklahoma Supreme Court's decision in this case conflicts with this Court's precedents. Pet. at 8-11. SWB's conclusion is based on its erroneous portrayal of the Oklahoma Supreme Court's holding and SWB's conclusion that due process is met only if a judicial due process standard is adhered to rather than a legislative due process standard. A correct reading of the Oklahoma Supreme Court's decision makes clear the fact that it does not conflict with any of this Court's precedents.

1. Ratemaking is legislative in nature.

This Court has consistently affirmed state court holdings that ratemaking is legislative in nature. *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908); *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (summarizing *Prentis* and more recent cases citing it with approval). Accordingly, the Oklahoma Supreme Court's characterization of ratemaking as legislative does not conflict with this Court's precedents.

2. Procedural due process, as developed in adjudicative proceedings, does not necessarily apply in non-adjudicative proceedings.

Having characterized ratemaking as legislative in nature, the Oklahoma Supreme Court held that *judicial*

standards of due process do not apply to such proceedings. This part of the holding does not conflict with this Court's precedents.

As indicated recently in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993), due process requires a neutral and detached judge for a judicial or quasi-judicial function, but not for a non-judicial function (which in *Concrete Pipe* involved an enforcement proceeding), provided a neutral adjudicator will conduct de novo review of all factual and legal issues. The Oklahoma Supreme Court decision is fully consistent with *Concrete Pipe*; the Corporation Commission need not conform to *judicial* standards of due process when conducting ratemaking proceedings which are legislative, but the Oklahoma Supreme Court will fully protect the rights of the utility and other parties by reviewing all factual and legal issues de novo.

3. The due process rights of regulated parties to ratemaking are satisfied by judicial review, in the independent judgment of the state court, of (1) the rate order, to protect against the imposition of an unreasonable or confiscatory rate, and (2) the fundamental fairness of the proceedings, to guarantee that the utility has a proper opportunity to create a fair record of its case during the ratemaking proceeding.

This Court has decided only a few cases regarding due process in individualized ratemaking proceedings, that is, ratemaking affecting only one or a small number of regulated parties. These decisions outline the elements

of due process. None of this Court's precedents require a state court to entertain a petition to recuse a commissioner in a pending ratemaking proceeding.

West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63 (1935), held that if a commission establishes a rate that is above the confiscatory level, but gives the utility a suitable opportunity through evidence and argument to challenge the result, there is no denial of due process, even though there is irregularity or error in the proceedings. This Court insisted only on the fundamentals of a fair hearing. Along similar lines, *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), held that a commission's failure to identify the sources of information of which it took official notice, that is, its failure to provide a fundamentally fair proceeding, violated the utility's right to due process.

The combined effect of both cases coincides with the result reached by the Oklahoma Supreme Court in the instant case. Due process is satisfied if the rate is not confiscatory, which is a matter of substantive due process, and if the ratemaking proceedings meet a standard of fundamental fairness, which is a matter of procedural due process. Fundamental fairness is preserved if the utility has an opportunity to create a fair record of its case during the ratemaking proceedings, thus ensuring that the reviewing court will have an adequate record on which to decide the substantive due process issue of confiscatory rates.

The Oklahoma Supreme Court's decision is also consistent with *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), where this Court discussed the broad

powers of the Corporation Commission and reviewed the end result of the Corporation Commission's process, without discussing the procedure followed by the Corporation Commission in reaching that result.

SWB is mistaken in asserting that the Oklahoma Supreme Court's decision in this case conflicts with the decisions of this Court in *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); and *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). Pet. at 8-9. These precedents hold that a party whose individual rights are at stake must have an opportunity "to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Londoner*, 210 U.S. at 385. Obviously, SWB has fully enjoyed a highly elaborate version of this right throughout the pending ratemaking proceeding, which has been going on since 1986. SWB has consistently had the opportunity to present its arguments and its proof and will continue to have this opportunity in the future; SWB does not remotely suggest the contrary. Accordingly, these proceedings conform fully to the requirements of *Londoner*, *Bi-Metallic* and *Florida East Coast*.

The Oklahoma Supreme Court held simply that *judicial* due process does not apply in these ratemaking proceedings. Pet. App. at 6a (emphasis added). The court did not preclude the application of other types of due process. To the contrary, the court guaranteed due process by reaffirming SWB's right to judicial review of the final rate order. The Oklahoma Supreme Court's precedents demonstrate the effectiveness of this guarantee. *See, e.g.*, *Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305 (Okla.

1992) (Pet. App. at 75a-102a); *Turpen v. Oklahoma Corporation Comm'n*, 769 P.2d 1309 (Okla. 1989).

Therefore, the question is not whether SWB has a Fourteenth Amendment due process right to an individualized ratemaking proceeding. SWB clearly has that right, and it continues to exercise that right. The question, rather, is whether the Fourteenth Amendment due process right attendant to an individualized ratemaking proceeding includes the right to recuse Commissioner Anthony from a pending ratemaking proceeding under the circumstances of this case.

4. The Federal Administrative Procedure Act does not require application of a judicial standard for ratemaking.

SWB'S reflections on the impact of the federal Administrative Procedure Act (Pet. at 17) provide no support for SWB. First, the Act obviously does not define Fourteenth Amendment due process or weaken this Court's longstanding precedents. Second, the Act includes ratemaking in the definition of rulemaking, 5 U.S.C. § 551(4), and therefore does not require an adjudicative process in ratemaking.

5. The rule of necessity is correctly stated in the Oklahoma Supreme Court's opinion.

As discussed in II, *supra*, the portion of the Oklahoma Supreme Court's decision discussing the rule of necessity is not subject to review, as it was merely advisory to the parties in the context of the ratemaking. Assuming,

arguendo, that this portion of the decision is reviewable, it correctly stated and applied this Court's precedent established in *United States v. Will*, 449 U.S. 200 (1980).

B. Conflicts with other state courts are not sufficiently significant to justify the grant of certiorari.

State courts in South Dakota, Tennessee and Illinois have entertained motions for interlocutory judicial review of decisions by public utility commissioners which denied motions for recusal from pending regulatory proceedings. In *Northwestern Bell Telephone Co. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990), a motion by Northwestern Bell to disqualify a commissioner from pending and all future cases alleged that the commissioner's prior statements on deregulation demonstrated bias. Upon the commissioner's denial of the motion for recusal, the court entertained interlocutory review. The court noted that the test for disqualifying a commissioner in *adjudicative* proceedings is prejudgment. But in rulemaking or legislative proceedings, including ratemaking, the Court found that the test is whether there has been a clear and convincing showing that the official has an "unalterably closed mind" on critical matters. Applying this test, the court held the commissioner disqualified from pending dockets, but not from future ones.

Similarly, *Tennessee Cable Television Ass'n v. Public Service Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992), *review denied* (Tenn. 1992), held that the test for disqualifying a commissioner from rulemaking is an "unalterably closed

mind." The court found no grounds for disqualification in that case.

The Illinois court in *Business and Professional People for the Public Interest v. Barnich*, 614 N.E.2d 341 (Ill. App. Ct. 1993), ordered the recusal of a state commerce commissioner for bias because he admitted to having numerous ex parte communications with officials of a utility company under rate review by the commission. The appeals court determined the issue of recusal on the basis of state statutes which required the agency decisionmaker to avoid the appearance of impropriety. The state Administrative Procedure Act, applicable to the Illinois commission, prevented ex parte communication with parties to a contested case about issues involved in the matter. The court considered the commissioner to have a duty to recuse himself.

The Oklahoma decision in the instant case conflicts with those other state courts only to the extent they entertained interlocutory judicial review of actions by commissioners denying motions for recusal. This conflict is not, however, an appropriate basis for this Court to grant SWB's Petition for Writ of Certiorari, because (1) the conflict is based substantially on state law (the decision of the Illinois court was based on statutes which established an appearance of impropriety standard not applicable to the Oklahoma commission); (2) the factual record in this case falls far short of meeting the "unalterably closed mind" test adopted by the South Dakota and Tennessee courts; (3) there is no indication that state courts need guidance on this issue; and (4) the Oklahoma Supreme Court's decision in this case is not a final order,

and is therefore ineligible for review by this Court. *See* I, *supra*.

In fact, most of the state authorities reviewed by SWB in its Petition (Pet. at 16, n.4) agree with the rationale of the Oklahoma Supreme Court. Several explicitly reject the concept of adopting extensive "trial-type" due process procedures in individualized ratemaking proceedings. *See, e.g., Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Company*, 571 A.2d 606 (Vt. 1989); *Gulf States Utilities Company v. Louisiana Public Service Commission*, 578 So.2d 71, 79-84 (La. 1991); *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328 (Wash. 1983).

IV. THE STATE COURT HAS CORRECTLY DECIDED THE FEDERAL CONSTITUTIONAL ISSUE.

As demonstrated above, the Oklahoma Supreme Court's decision does not conflict with any of this Court's precedents. Furthermore, the Oklahoma Supreme Court correctly decided the federal constitutional issue.

A. The state court properly held that ratemaking is legislative, and the court adequately protected the due process rights of the utility.

The Oklahoma Supreme Court's decision in this case correctly characterized ratemaking as legislative. *See* III, *supra*.

The Oklahoma Supreme Court denied SWB's interlocutory petition to recuse a commissioner, but stated that SWB will be able to appeal from the final rate order on

two interrelated grounds: (1) if the end result is unreasonable or confiscatory, or (2) if the procedure violated the requirements of fundamental fairness by denying SWB a proper opportunity to create a fair record during the presentation of its case to the Corporation Commission. The Oklahoma Supreme Court indicated it will provide independent review of the final rate order, but will not provide interlocutory review. Due process requires no more than this. *See* III, *supra*; *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63 (1935); and *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937).

B. Assuming due process requires ratemaking to be characterized as something other than legislative, the state court committed harmless error.

Assuming, *arguendo*, that due process requires ratemaking to be characterized as something other than legislative, the Oklahoma court committed harmless error in characterizing ratemaking as legislative. This is true whether due process requires ratemaking to be characterized as rulemaking or as adjudicative.

1. If individualized ratemaking is rulemaking.

Assuming due process requires individualized ratemaking to be regarded as rulemaking, this Court has provided no precedent for determining the standard for recusal, or for determining whether due process requires a state court to exercise interlocutory review of disputes about recusal. According to the two state courts that have addressed the issue recently, the standard for recusal in

ratemaking, when the ratemaking is regarded as a rulemaking proceeding, is an "unalterably closed mind." *Northwestern Bell Tel. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990); *Tennessee Cable Television Ass'n v. Public Service Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992) *review denied* (Tenn. 1992). *See also Association of National Advertisers, Inc. v. Federal Trade Comm'n*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The record in this case does not establish that Commissioner Anthony had an unalterably closed mind.

2. If individualized ratemaking is adjudicative in nature.

As an even more remote possibility, if due process requires ratemaking to be characterized as adjudicative, the standard for this Court to review a decision of a state court or agency on recusal in adjudicative proceedings is extremely limited. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). That opinion included an extensive discussion of bias and financial interest, emphasizing the deference due state courts, though holding that a justice of the Alabama Supreme Court should have recused himself from participating in a case of first impression regarding the availability of punitive damages against an insurance company for bad-faith refusal to settle a claim, when the justice had a personal claim pending against another insurance company at the same time, and the justice's personal claim was affected by the outcome of the case before the court. The record in the instant case does not establish that Commissioner Anthony should be recused under this standard.

A distinction must be made between due process cases, such as *Aetna Life*, and cases applying statutory grounds for disqualification of federal judges or officers. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Liteky v. United States*, 114 S. Ct. 1147 (1994). Cases requiring recusal on statutory grounds do not control this case; *Aetna Life* controls.

The two primary Fourteenth Amendment due process cases involving review of state proceedings which are most frequently cited by SWB are *Gibson v. Berryhill*, 411 U.S. 564 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Neither case helps SWB's argument. In both cases, the pivotal issue was the existence of a personal and pecuniary interest in the outcome of the proceeding. Commissioner Anthony has no personal and pecuniary interest in the outcome of the SWB proceeding.

A second category of Fourteenth Amendment due process cases is cited by SWB, particularly *In Re Murchison*, 349 U.S. 133 (1955), in which judicial officers, involved in state prehearing procedures for criminal contempt determinations, developed significant bias because of prejudgment of facts about defendants they would eventually try for the charged offense. The facts of the instant case do not support a conclusion that Commissioner Anthony has prejudged issues in the pending rate case, or that he maintains a personal or pecuniary interest in the outcome.

An Oklahoma corporation commissioner possesses investigative and decision-making authority over regulated public service companies. *See* Okla. Const., art. IX, §§ 18 and 28. Therefore, the cases which are far more

relevant to the facts of this case, if ratemaking is considered adjudicative, are *Withrow v. Larkin*, 421 U.S. 35 (1975) and *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976), where it was recognized that the combination of investigative and adjudicative functions within a state administrative agency does not violate Fourteenth Amendment due process standards.

CONCLUSION

For the reasons stated herein, this Court should deny SWB's Petition for Writ of Certiorari.

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No. 94-73

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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22 pp

QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court's decision to deny recusal of an allegedly biased commissioner in a pending ratemaking proceeding is ripe for review;

AND, if this Court determines this case is ripe --

2. Whether, under the facts of this case,* the procedures suggested by the Oklahoma court** to deal with the state constitutional strictures satisfies federal due process concerns.

* This case is a civil proceeding where (a) actual bias concerning the merits of the case has not been demonstrated, (b) the alleged bias is not pecuniary, but stems directly from purportedly unlawful and unethical actions taken by persons representing the entity seeking recusal, (c) senior representatives of that entity were informed by the allegedly biased commissioner of these actions in 1990 and of the pending FBI probe in 1991, and did not seek recusal until late 1992 -- acting only when the commissioner publicly announced his cooperation with the FBI probe of, inter alia, the unethical actions, (d) the state supreme court lacks authority to replace the commissioner and his presence will be necessary to conclude proceedings, if, at the end of the proceedings, the two other commissioners deadlock on any issue, and (e) no allegations of bias have been made against the two remaining commissioners.

** If disappointed with the commission's disposition of the pending proceedings, the entity has an opportunity to challenge the action on appeal under a heightened standard. If a violation of constitutional rights is asserted, the review includes an independent review of the law and facts as to, inter alia, whether the order is confiscatory or the utility was denied the right to make a fair presentation.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-73

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. NARUC, which Congress calls "the national organization of the State commissions", 47 U.S.C.A. §410(c) (1971), presents the collective interest of State commissions charged with regulating the rates and conditions of service of electric, natural gas and telephone utilities operating within their respective jurisdictions. Both

Congress and the federal courts have long recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

NARUC's member commissions, which includes the Oklahoma Corporation Commission (OCC), are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America.

NARUC submits this brief as *amicus curiae* [2] in support of the OCC -- respondents to the petition for certiorari filed by Southwestern Bell Telephone Company (SWB) -- because of the deleterious impact upon the ability of State regulatory commissions to effectively scrutinize and regulate

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[1] See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, et al.*, 471 U.S. 48, 53 (1985) at 10, "[t]hroughout this litigation, the NARUC has represented the interests of the Public Service Commissions..."; *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976); *U.S. v. Western Electric Co., et al.*, 569 F.Supp. 1057 (D.C. D.C. 1983) at note 17; *National Association of Regulatory Utility Commissioners v. FCC*, 423 U.S. 836, (1975).

[2] Pursuant to Rule 37.2, U.S. Supr.Ct. Rule 37, 28 U.S.C.A. (1994), NARUC has obtained the consent of the parties to the filing of this brief. Copies of the letters of consent have already been filed with the Clerk of the Court.

utilities that could potentially ensue should this Court chose to review and ultimately reverse the decision below.

STATEMENT OF THE CASE

The OCC derives its authority directly from the Oklahoma Constitution and is subject to the direct and exclusive appellate jurisdiction of the Oklahoma Supreme Court. In October 1992, Robert Anthony, one of three popularly elected OCC commissioners, announced that he had been cooperating as a witness in an Federal Bureau of Investigation probe of the agency since 1988. According to his statement, industry representatives paid him thousands in cash, usually in the guise of purported "campaign contributions", in exchange for influence. Where cash was received, the FBI received the funds immediately. Mr. Anthony's statement came six weeks after an August 1992 $93.7 million rate reduction and $183 million refund order, in OCC Docket PUD-260, directed to the regulated entity most heavily implicated in the 1989 "cash for votes" scheme -- telecommunications giant SWB.

Although in 1990, well in advance of his announcement, Mr. Anthony advised a SWB senior corporate officer of improper conduct by SWB spokesmen, and, in 1991, discussed the "ongoing FBI investigation" with a SWB

corporate attorney -- no recusal action in the PUD-260 docket was sought until he publicly announced his cooperation in the FBI investigation. As issues related to the source of cash delivered to Mr. Anthony and the potential culpability of other actors are currently pending in other forums, at note 1, page 3, of its petition, SWB proffers "for the record" its "position" that no "impropriety" was "authorized or attributable" to it.

SWB appealed the October 1992 PUD-260 order. The appeal resulted in a remand of several issues. In November 1992, SWB filed an original action with the Oklahoma Supreme Court seeking to recuse Mr. Anthony from the still pending PUD-260 proceedings, and all future SWB cases, citing his alleged bias. SWB's recusal actions resulted in two decisions. First, on May 23, 1993, the court disqualified Mr. Anthony from participating in the ongoing proceeding, but rejected a SWB request for a blanket recusal for future proceedings pending resolution of any federal criminal prosecutions. The OCC moved for rehearing suggesting that the decision was contrary to existing precedent construing the OCC's power as legislative under the state's constitution.

On April 14, 1994, the court granted the OCC request and held that it is unable to recuse Mr. Anthony through the SWB writ action. The opinion found that, in the context of the SWB rate proceeding, the OCC was exercising legislative

authority and that due process considerations requiring a neutral decision-maker did not attach. The court also contended that, regardless of how the proceeding is characterized -- quasi-judicial or legislative -- the "rule of necessity" will make it impossible for Mr. Anthony to be recused as (a) there is no Oklahoma constitutional or statutory authority to allow either the governor or the Supreme Court to replace a commissioner with the appearance of bias and (b) after the proceedings have been completed, without a third sitting commissioner, the two remaining commissioners might deadlock over individual issues or the entire proposed order.

The court also noted that any company challenging a commissioner for bias, regardless of how the proceeding is characterized, will still have a remedy via its ability to challenge the agency action on appeal under a heightened standard of judicial review -- a review which, under Oklahoma law -- includes an independent review of the law and facts if a violation of constitutional rights is asserted. SWB's writ asks this Court to reverse the April 1994 decision.

ARGUMENT

NARUC supports all of the arguments presented by the OCC in its Opposition. Mindful of Rule 37.1's admonishment, U.S. Supr.Ct. Rule 37.1, 28 U.S.C.A. (1994), NARUC seeks only to complement the OCC arguments with a brief discussion of related doctrines and relevant arguments.

I. THE PETITION IS NOT RIPE FOR REVIEW

The U.S. Constitution's Article III mandate limiting federal judicial power to "cases and controversies" requires a court to consider whether a case has matured or ripened into a controversy worth of adjudication before addressing its merits. This ripeness doctrine assures that federal courts do not decide purely abstract or theoretical claims, or render advisory opinions. The ripeness defense also often reflects prudential considerations.

In the leading case of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), this court defined the primary factors that determine if a case is ripe for review: the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." NARUC contends that both the "hardship to the parties" criterion, and the "fitness" factor are wrapped up in the open-ended posture of the case presented for review.

Indeed, a crucial factor in assessing whether an issue is "fit" for review under *Abbot*, is whether the agency's action is "final" in the sense that the agency has reached a definitive conclusion. Id. 387 U.S. at 149-50. Thus, in this regard, the Article III derived ripeness doctrine significantly overlaps the statutory "finality" mandate found in 28 U.S.C. § 1257(1988). As the OCC exhaustively analyzed this statutory "finality" requirement in its Opposition - finding that, under the tests enunciated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Oklahoma court's decision is not eligible for review under the finality doctrine -- NARUC will not replicate its efforts here. However, it is important to note that the PUD-260 proceeding has not been completed. Thus, even if we assume, arguendo, Commissioner Anthony is actually biased, SWB could still achieve the result it desires at the close of the OCC proceeding without implicating any constitutional concerns due to the presence of a majority (two) of "unbiased" commissioners. In any case, other than the "routine" presentation of its case in chief, SWB is not required to make any additional efforts until completion of the OCC ratemaking proceedings. At that time, the action it is prematurely proffering for this Court's consideration will clearly have matured -- if it appears either (i) the OCC's final order is unreasonable or confiscatory, or (ii) if the OCC

procedure, i.e., allowing Mr. Anthony to participate, actually violates the requirements of fundamental fairness by denying SWB a proper opportunity to create a fair record during its presentation of its case. Moreover, as discussed below, even if constitutional issues do subsequently arise, SWB will have sufficient protection of its due process rights via the posited "heightened review" of both legal and factual issues before a completely unbiased body -- the Oklahoma Supreme Court.

II. IF THIS COURT FINDS THIS PROCEEDING RIPE FOR REVIEW, IT IS APPARENT THAT THE REMEDIES POSED, UNDER THE SPECIFIC FACTS OF THIS CASE, ACCORD SWB THE PROCESS THAT IS DUE.

It is axiomatic that, once the Court determines that a constitutionally protected liberty or property interest has, in fact, already been infringed upon and the case is thus ripe for review -- the next stage of a due process analysis is to decide exactly what procedural protections the U.S. Constitution requires.[3]

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[3] Federal and state cases like *Liteky v. United States*, 114 S. Ct. 1147 (1994), which require recusal on statutory grounds, often even when no actual bias is demonstrated, are not relevant to making this Constitutional analysis.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court demonstrated its determination to retain flexibility in making these determinations, specifically noting that it would examine three factors to decide what due process requires in a given situation: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the...substitute procedural requirement would entail." [4]

The first stage of this analysis is not difficult. SWB's "private interest" is, of course, its capital infrastructure and its

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[4] Although initially, the Court used the *Mathews* test predominantly in cases involving government benefits, more recently, it has adopted this approach in a more tradition-bound area of administrative law -- coercive regulation of business. Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), where the test was used to decide the procedural rights of an employer ordered to reinstate an employee while the employee's allegations of retaliatory discharge was pending.

related ability to earn a return on its investment. Both will likely be significantly affected by the OCC "official action", i.e., final ratemaking order, regardless of whether any constitutional infringements actually occur.

The more difficult inquiry is assessing how that interest can possibly be placed at risk by the alleged bias of Commissioner Anthony. SWB has not even attempted to explain how Anthony's participation in OCC proceedings will violate its due process rights. It has merely waved the "neutral decision-maker" banner and pointed out certain facts - (i) SWB representatives made allegedly improper overtures to Mr. Anthony that included cash inducements, (ii) the FBI instigated an investigation of corruption at the OCC; and (iii) Mr. Anthony determined to cooperate with the federal authorities. These facts do not demonstrate any improprieties, other than those apparently committed by SWB. Nor do they demonstrate that Mr. Anthony is in any way biased against SWB in its pending rate case. Indeed, as SWB admits in its

petition, at 2, the only subsequent action related to these SWB contacts taken was a discovery request seeking "documents not related to any regulatory issues, but" to an "investigation of alleged corruption." {Emphasis Added}

As the request was not related to the merits of the pending PUD-260 proceeding, it was entirely proper. This Court has recognized that a single hearing officer or agency may be given a combination of investigative and adjudicative functions without implicating the 14th Amendment. Thus, a decision-maker can be charged with investigating and compiling facts in a case and making decisions based on those facts. See generally, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976), Rotunda, *The Combination of Functions in Administrative Actions*, 40 Ford.L.Rev. 101 (1971). Certainly, as an OCC Commissioner, Mr. Anthony has the option, if not the duty, to instigate investigations of corruption affecting the

OCC's procedures.

An examination of the other cases cited by SWB and its allies is instructive. For example, Petitioner SWB suggests the remedy of "heightened review" posed by the Oklahoma Supreme court "is in conflict with this Court's precedents," SWB Petition at 11, and cites *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct 2264, 2277 (1993), as "holding" that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." While the Court did make the quoted statement in dictum, the "holding" was a bit more specific -- finding that the "judge" in an enforcement setting, did not have to meet otherwise applicable standards of neutrality if, as in the instant case, a neutral decision-maker was subsequently available to conduct a *de novo* review of all factual and legal issues.

SWB's argument also ignores those federal cases, it and its supporting amici cite, where a subsequent second

hearing by a separate and "unbiased" decision-maker was deemed adequate to correct due process violations. See, e.g., *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (1970), vacating an FTC order because of the participation of a clearly biased commissioner and requiring a second hearing before a differently constituted "decision-maker"; *Jarrott v. Scrivener*, 225 F.Supp 827 (D.C.D.C. 1964), finding improper bias on the part of the majority of a five member board and requiring a second hearing before a different decision-maker; *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943) where the court found clear evidence of bias on the part of a single presiding Administrative Law Judge and vacated an NLRB order based on that judge's decision for a second hearing before a different decision-maker.

In any case, the only cases SWB cites where this Court has required both (a) a neutral decision-maker in the first instance AND (b) suggested that a subsequent review de novo

might be inadequate to cure due process concerns have a very restricted factual context. In each case, the decision-makers have had either a direct monetary interest in the outcome or they were professional competitors of the individuals seeking a ruling. See, SWB Petition at 4 & 11; citing, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); which cites both *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) and *Tumey v. Ohio*, 273 U.S. 510 (1927) [5] as supporting a finding that "...those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes" and extending that interest to encompass a Board of Optometrists disqualifying competitors.

In all these cases, unlike the case on review, the purported bias was directly connected to the merits of the matter submitted to the decision-maker. The *Cinderella* case, 425 F.2d 583 (1970), illustrates the point. There, the FTC

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[5] Both *Ward* and *Tumey* are cases where a single judge enforcing criminal fines against individuals had a direct financial interest in the collection of those fines.

order was vacated because of possible influence of one commissioner upon the other four commissioners at the agency. The focal point of the decision was a finding of actual bias on the part of the subject commissioner. More specifically, in that case, the "biased" commissioner was found to have basically prejudged the merits of the case. As it appears no evidence has been presented showing any actual bias by Commissioner Anthony concerning the merits of the pending PUD-260 proceedings, NARUC respectfully suggests that the procedures outlined by the Oklahoma court are adequate to protect SWB's rights.

Finally, the *Mathews* test instructs the Court to examine the probable value of the proposed safeguard -- in this case -- requiring the recusal of Mr. Anthony -- and the Government's interest, including the function involved and the fiscal and administrative burdens that the substitute procedural requirement would entail. As the decision on review notes, there is no provision for the appointment of a pro tempore

commissioner to substitute for a biased commissioner. If Mr. Anthony is recused and the remaining two commissioners deadlock on any aspect of the decision, it would appear that certain aspects of the case presentations will have to be reargued and/or resubmitted before Mr. Anthony to allow him to break the deadlock. This would unnecessarily burden the OCC staff. Moreover, even if one discounts NARUC's arguments concerning the impact of Mr. Anthony's alleged bias on the proceeding, the presence of a majority of "unbiased" commissioners participating in the OCC deliberations, in tandem with the subsequent availability of a remedial "heightened review" before the Oklahoma Supreme Court as discussed earlier, assures that SWB's rights will be adequately protected.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF CERTIORARI

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SOUTHWESTERN BELL TELEPHONE COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF CERTIORARI

INTEREST OF AMICUS CURIAE

This case raises the question of whether a state agency may change a regulated utility's existing rates without providing an impartial decisionmaker. Although the petitioner here is a regulated utility, the ruling below would apply with equal force (and perhaps be more likely to arise) when it is the ratepayers who are challenging the impartiality of an administrative decisionmaker.

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, Inc., a non-profit public interest organization with approximately 125,000 members,

650 of whom reside in Oklahoma. Public Citizen, through the attorneys in its Litigation Group, has represented its members and consumers generally in ratemaking proceedings. All of Public Citizen's members are affected by the outcome of ratemaking proceedings. Although relatively few are directly subject to the Oklahoma court decision, all are put at risk by the precedential force of a decision which permits biased decisionmakers to participate in ratemaking proceedings. Because Public Citizen believes that the decision of the Oklahoma Supreme Court severely impairs the ability of consumers to be heard and to obtain meaningful redress in ratemaking proceedings, it supports the petition in this case.

Public Citizen submits this brief to present its somewhat different analysis of the due process issue from that which petitioner has offered. Public Citizen has long advocated the use of the three-part test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to resolve issues of what process is due in a variety of contexts. It believes that the *Matthews* analysis is applicable to the due process issues presented in this case, and that it requires reversal of the decision below.

STATEMENT OF THE CASE

In June 1987, the Oklahoma Corporation Commission's Public Utility Division ("PUD") initiated Cause No. PUD-260, to determine what modification in the telephone rates of petitioner Southwestern Bell Telephone Company would be necessary in light of the 1986 reduction in federal corporate income taxes. After some delay to allow other interested parties to intervene, four hearings took place in late January and early February 1989. The hearings were adversarial, with representatives from the State, the PUD staff, the American Association of Retired Persons ("AARP"), and Southwestern Bell participating. Each party submitted evidence, including live testimony, as well as proposed

findings of fact and conclusions of law. The hearing examiner adopted the suggestions of the PUD Staff *in toto*, including a finding that petitioner had accumulated a $30 million windfall between 1987 and October 1989 from the reduction in federal income taxes without a corresponding reduction in its rates.

During its review of that ruling, the full Corporation Commission independently examined the evidence adduced at the hearings and adopted almost all of the hearing officer's findings. In accordance with these findings, the Commission issued an order which (a) assessed an interest charge of 11.59% against petitioner's $30 million windfall, (b) mandated that the windfall be spent to upgrade corporate facilities and improve customer service, and (c) required petitioner to reduce future rates to account for the tax change.

Petitioner, the AARP, and the State appealed various portions of the Commission's order to the Oklahoma Supreme Court. In *State Ex. Rel. Henry v. Southwestern Bell*, 825 P.2d 1305 (Okl. 1991) (as modified at Denial of Rehearing on March 2, 1992) (Pet. App. 75a-102a), the court upheld key provisions of the order, including the Commission's conclusion that the $30 million windfall did not have to be refunded directly to ratepayers, but could be spent to upgrade communications service. However, the court determined that certain technical components of the Commission's ratemaking formula were not supported by substantial evidence, and remanded the order to the Commission for recalculation.

On October 2, 1992, during the remand of PUD-260, Commission Chairman Robert Anthony revealed for the first time that he had been an informant for more than four years in an investigation of corruption at the Commission. Anthony specifically alleged that an officer and several attorneys associated with petitioner had "engaged in improper activities" during the course of PUD-260, and that he had received several large bribes from these officials. Anthony

also reported that he had filed bar complaints against two of petitioner's attorneys, and that he had filed a discovery request seeking documents from petitioner to corroborate his story.

Petitioner immediately moved to recuse Chairman Anthony from further participation in PUD-260. Upon the Commission's denial of the motion without opinion, petitioner appealed to the Oklahoma Supreme Court, arguing that recusal was required by the Due Process Clauses of the Oklahoma and U.S. Constitutions.

The Oklahoma Supreme Court affirmed the denial of the recusal motion. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001 (Okl. 1994) (Pet. App. 1a-59a). The court did not examine the extent of Chairman Anthony's predisposition or dispute that the conduct of Chairman Anthony gave rise to improper bias under Oklahoma law. Instead, it ruled as a matter of law:

> When Anthony and his fellow Commissioners hear PUD-260 they will act in their legislative capacity. That distinction is determinative of the issue presented for, as discussed below, proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards urged by SWB. Pet. App. 6a.
>
> This recognition of the legislative nature of ratemaking proceedings and the resulting inapplicability of judicial concerns and standards, including due process notice and hearing requirements, has been repeatedly affirmed by this Court. *Id.* at 9a.

Thus, the court below held, not only under Oklahoma law, but under the Due Process Clause of the U.S. Constitution, that a particularized ratemaking proceeding is not subject to any requirement of impartiality or other due process

protection so long as the proceeding is characterized as "legislative" by the appropriate state court.

REASONS FOR GRANTING THE WRIT

The Oklahoma Supreme Court Decision is Inconsistent with this Court's Previous Pronouncements on Due Process in an Administrative Context.

While Public Citizen supports the efforts of Chairman Anthony, and, implicitly, those of the Oklahoma Supreme Court, to eliminate corruption in Commission ratemaking, that concern does not justify the ruling below. Based on that ruling, the Oklahoma Supreme Court would also dismiss a consumer complaint that a Commissioner had accepted a bribe from a regulated utility simply because, according to the Oklahoma Supreme Court, ratemaking activities are "legislative," and hence no standards of impartiality may be imposed on the process.

The Oklahoma Supreme Court's due process analysis is inconsistent with two strands of this Court's due process jurisprudence. As petitioner points out, the court below misapplied basic principles of due process from the "classic" phase of due process jurisprudence, which sharply distinguished between general and particular proceedings. *See generally Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). *Cf. United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244-46 (1973). Furthermore, the court below ignored a significant body of this Court's ratemaking due process precedents, cited on page 11 of the petition, under which substantial procedural protections are mandated

by the due process clause for individual ratemaking proceedings.*

Moreover, the court below entirely failed to engage in an essential line of modern due process inquiry. The proper due process analysis for an administrative hearing is not, as the Oklahoma Supreme Court asked, whether "due process applies," but rather, "what process is due?" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In recent years that question has been answered under the balancing test enunciated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). *Matthews* has been employed in a vast array of situations beyond its original context of informal administrative adjudication. *See e.g., Connecticut v. Doehr*, 501 U.S. 1 (1991); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Ingraham v. Wright*, 430 U.S. 651 (1977). Hence, *Matthews* provides the proper analysis for determining the procedural requirements for the ratemaking proceeding here.

In *Matthews*, this Court required the balancing of three separate factors to determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an

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* In addition to the cases petitioner cited, there are several other non-Administrative Procedure Act cases which hold that individualized ratemaking warrants heightened due process consideration. *See, e.g., Railroad Com. of California v. Pacific Gas & Elec. Co.*, 302 U.S. 388 (1938); *Morgan v. United States*, 304 U.S. 1 (1937) ("Morgan II"); *St. Joseph Stock Yards Co. v. United States*, 208 U.S. 38 (1935). In contrast, the Oklahoma Supreme Court's exclusive reliance on *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), is misguided. That case concerns the applicability of 28 U.S.C. §2283, the Anti-Injunction Act, to a ratemaking proceeding, and simply did not raise any of the due process questions at issue here.

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

Since there is no question that petitioner has a protected property interest in the establishment of its rates and the fate of its tax windfall, the question here is whether under *Matthews* the Corporation Commission can make these ratemaking determinations where one of its members is biased against one of the parties. We consider each of the three factors in turn, and then show that the balance is overwhelmingly in favor of requiring an impartial decisionmaker.

A. *The Private Interest in Favor of Additional Protection*

Petitioner has substantial property interests at stake in ratemaking proceeding PUD-260. That proceeding will determine the disposition of the $30 million that petitioner has already collected from Oklahoma consumers, as well as the applicable interest charge assessed on petitioner's interim use of this money. Moreover, the proceeding will determine the future rates that petitioner may charge. Where property has been determined to be substantial in size, this Court has recognized that the private interest in additional process is significant. *Tulsa Collection Services v. Pope*, 485 U.S. 478, 488-89 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983).

Although the interests of individual Oklahoma consumers may not be great, collectively their interests equal that of Southwestern Bell, such that consumer interests merit distinct consideration in determining the constitutional requirements for Corporation Commission proceedings. In

this regard, we note that the Oklahoma Corporation Commission wields tremendous power over matters of concern to consumers. In addition to establishing and modifying rates for public utilities, the Commission has broad regulatory authority over all transportation, natural gas production, oil production, power company, telecommunication, and waste disposal activities occurring in Oklahoma. OK Const. Art. 9 §16. Oklahoma consumers undoubtedly have an interest in the modification of Southwestern Bell's rates generally, as well as in this particular proceeding. Thus, consumers here may receive a refund, or a different quality of service, or the prices they pay for continued service in the future may be altered. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978).

B. *Incremental Improvement in Accuracy*

The second factor is the fairness and reliability of the existing procedures, and the incremental accuracy to be gained from additional process -- here the requirement of an impartial administrative decisionmaker. The Corporation Commission's existing ratemaking procedures clearly demonstrate that the people of Oklahoma place significant importance on fair and accurate determinations in ratemaking proceedings. The following are but a few of the features of this highly judicialized process:

- The process requires 10 days notice "to all interested parties" prior to the commencement of any hearing. OK Const. Art. 9, §18; OAC §165:5-7-1. A ratemaking application must designate particular "respondents" and must state with some specificity the supporting facts, legal authority, and relief sought. OAC §165:5-7-1(d).
- The process must "afford a reasonable opportunity to present evidence and to be heard." OK Const. Art. 9 §18. The Commission's regulations allow for the

opportunity to obtain evidence through depositions (OAC §165:5-11-1(a)), document production (OAC §165:5-11-1(b)), and interrogatories (OAC §165:5-11-1(c)). Furthermore, parties may compel the attendance of witnesses through subpoenas. OAC §165:5-11-3. Evidence must be produced at trial (OAC §165:5-9-1(c)), and may be challenged through the Oklahoma Rules of Evidence (OAC §165:5-13-3(e)) and cross-examination (OAC §165:5-13-3(g)). All evidence is to be taken on the record. OAC §165:5-13-3(i).

- Judicial review of Commission orders is available as of right in the Oklahoma Supreme Court (OK Const. Art. 9, §20), and review must take place on the basis of the record made before the Commission. OK Const. Art. 9, §22. The court exercises at least "substantial evidence" review for all Commission actions, and for certain constitutional challenges the court exercises de novo review as to law and fact. *Id.* The Oklahoma Supreme Court may receive additional evidence to investigate an alleged constitutional violation. *Id.*
- On review to the Oklahoma Supreme Court, the Commission must provide a reasoned analysis for the order based on the evidence in the record. OK Const. Art. 9, §22.
- There are mandatory recusal procedures for Commissioners who have financial stakes in regulated companies. OK Const. Art. 9, §16.

The importance that Oklahoma places on fairness and accuracy during ratemaking proceedings is evident from these procedures. Indeed, the Oklahoma Constitution even recognizes that impartiality -- albeit only one type of impartiality, lack of financial interest in any party -- is essential for fair and accurate determinations during Corporation Commission proceedings. OK Const. Art. 9, §16. This narrow recusal provision produces the anomalous effect of mandating recusal for a Commissioner who receives

a bribe passed in stock certificates of a party, but not for a Commissioner who receives cash from that same party. Similarly, the provision would allow a Commissioner to sit if her spouse represented a party on a contingent fee basis, if a close relative testified as an expert witness in the proceeding, or if any number of other plausible bases for recusal were to arise. Given the nature of ratemaking proceedings in Oklahoma, assuring an impartial arbiter will advance "the prevention of unjustified or mistaken deprivations." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Many of the protections listed above implicitly assume that an impartial arbiter is responsible for operating the procedural safeguards. For example, such rudimentary participatory functions as the ability to obtain evidence through subpoenas (OAC §165:5-11-3) and other discovery (OAC §165:5-11-1(a,b,c)), to present evidence for the record (OAC §165:5-13-3(i)), and to challenge evidence through cross-examination (OAC §165:5-13-3(g)), are within the discretionary authority of the Commission, but a predisposed Commissioner cannot be expected to administer those rules fairly. Similarly, it is simply oxymoronic to expect a biased Commissioner to exercise "independent" judgment as to law and fact. *See Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277 (1993) (citing *Marshall v. Jerrico*) ("'Justice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'"). Furthermore, the failure to provide a neutral arbiter may work to deter public participation, and thereby prevent the Commission from obtaining a full and fair picture of the range of competing interests at stake in the proceeding.

C. *The Government Interest*

The final *Matthews* factor is the increased administrative burden associated with requiring additional procedural protections. In light of the extensive protections already provided to ratemaking participants in Corporation Commission proceedings, there are several reasons to believe that the additional burden of requiring an impartial arbiter would be minimal.

The burden of requiring recusal for lack of impartiality is quite small. The Oklahoma Constitution already contains a mandatory recusal process for Commissioners with a financial interest in a regulated company. OK Const. Art. 9, §16. In accordance with this provision, the Corporation Commission must remove Commissioners with an underlying financial conflict of interest, such as ownership of stock. Any resulting vacancy may be filled by the Governor. OK Const. Art. 9, §15. For the purposes of this proceeding, the existing recusal procedure could be easily be converted to provide recusal for predisposition or other instances of partisanship.

The Oklahoma Constitution also provides the judicial structure which would be necessary to determine whether a particular type of predisposition warrants recusal. Extensive judicial review of Corporation Commission activities is available to participants in proceedings as a matter of right. OK Const. Art. 9 §20. This includes the ability to exercise independent judgment as to law and fact, and the ability to receive additional evidence when an alleged constitutional violation has occurred. OK Const. Art. 9 §22. Thus, judicial review of an allegation of impropriety could be easily accommodated within the existing Oklahoma judicial framework. Furthermore, the number of cases in which a conflict of interest would raise recusal questions is presumptively low, and certainly would not tax the abilities of the Oklahoma court or administrative system.

Although it is sometimes appropriate under this prong to consider the burden of additional procedures to interests adverse to the petitioner -- here Oklahoma consumers -- the general requirement of an impartial arbiter here does not affect the balance. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987). While in this particular case consumers might "benefit" from the failure to provide an impartial arbiter, on the whole, the ability to remove biased arbiters will work to the benefit of consumers and regulated utilities alike.

D. *On Balance, the Oklahoma Supreme Court's Decision is Incompatible with this Court's Due Process Jurisprudence*

Having reviewed all three factors, it is clear that the Oklahoma Supreme Court's decision that there was no need to provide an impartial arbiter in this proceeding is inconsistent with this Court's modern principles of due process. *See Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277-78 (1993); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Schweiker v. McClure*, 456 U.S. 188, 195-97 (1982); *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242-43 (1980); *Friedman v. Rogers*, 440 U.S. 1, 17-19 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1975). Participants in Oklahoma Corporation Commission ratemaking proceedings are already entitled to significant procedural protections. The incremental burden of requiring an impartial arbiter in this situation (1) does not substantially add to the burden of the Corporation Commission because of the existence of mandatory recusal provisions for Commissioners with financial interests in regulated companies, and (2) will substantially enhance the accuracy and fairness of the ratemaking proceeding, since many of the procedural protections are implicitly unfair if the decision-maker is partial. The Oklahoma Supreme Court's resolution of the problem unacceptably impairs the ability of

consumers to participate in unbiased tribunals and to obtain redress for allegations of impropriety, in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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August 12, 1994

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* Counsel gratefully acknowledges the extensive assistance of John A. Freedman, a member of the class of 1995 at Harvard Law School.

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No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,
v.
OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION FOR THE STATE OF OKLAHOMA

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August 12, 1994

QUESTIONS PRESENTED

1. Should this Court exercise its extraordinary jurisdiction where the Oklahoma Supreme Court has not yet finally decided the issue of Commissioner Anthony's bias and related questions of law and fact regarding Bell's right to seek his recusal, nor completed its due process scrutiny?

2. Should this Court exercise its extraordinary jurisdiction where Bell has a more appropriate remedy available: the right to an evidentiary hearing before the Oklahoma Corporation Commission and an appeal of right to, and independent judicial review by the Oklahoma Supreme Court?

3. Should this Court exercise its extraordinary jurisdiction where the Oklahoma Supreme Court has simply followed this Court's guidance and refused to apply strict judicial due process protections to legislative administrative hearings?

4. Should this Court exercise its extraordinary jurisdiction where there is no confusion among the various states as to the requirements of federal constitutional due process in legislative administrative hearings?

PARTIES TO THE PROCEEDING

By statute, Oklahoma Legislature has mandated that the Attorney General of the State of Oklahoma shall protect the interests of Oklahoma utility customers, including those of Southwestern Bell Telephone Company ("Bell"), "in all rate-related proceedings before the Corporation Commission or in any other state or federal judicial....proceeding." Okla. Stat. tit. 74, sec. 18b(A)(20)(Supp.1993); see Appendix A. This mandate endowed the Attorney General with the status of party in the case below. Therefore, pursuant to *Sup. Ct. R.* 12.4., the Oklahoma Attorney General is a respondent in this proceeding.

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No. 94-73

IN THE

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OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION FOR THE STATE OF OKLAHOMA

Respondent the Attorney General of the State of Oklahoma ("Attorney General") respectfully requests this Court to deny the petition for a writ of certiorari filed by Southwestern Bell Telephone Company ("Bell") which seeks a review of the *en banc* decision of the Oklahoma Supreme Court.

STATEMENT OF THE CASE

Bell's Petition misstates questions of fact, law and even the holding of the Oklahoma Supreme Court. Pursuant to SUP. CT. R. 15.1., the Attorney General submits the following statement of the case.

In 1986 the Oklahoma Corporation Commission initiated Cause No. PUD 000260 ("PUD 260") to inquire into the effect of a reduction in federal income taxes on the rates of twelve Oklahoma utilities, including Bell. Ultimately, because of the large number of respondents, the Commission conducted separate hearings for each named utility. After a full evidentiary hearing in which Bell fully participated, the Commission issued its order in PUD 260. The order, titled "Order Regarding Rates of Southwestern Bell Telephone Company," found that the reduction in federal income taxes had reduced Bell's operating expenses and allowed Bell to accumulate over $30 million in "surplus funds" during the pendency of the case. The Commission ordered Bell to prospectively reduce its rates and to use the surplus funds to modernize its Oklahoma network.

On appeal, the Commission's order was ultimately affirmed by the Oklahoma Supreme Court except as to four issues which were reversed and remanded for further proceedings (the "PUD 260 remand"). *See Southwestern*

Bell Telephone Co. v. Oklahoma Corporation Commission, Pet. App. 60a. The PUD 260 remand is still pending before the Commission. It is Bell's attempt to oust Commissioner Anthony from participating in the PUD 260 remand which prompted the case below and the present Petition.

On October 2, 1992, while the PUD 260 remand was pending before the Commission, Commissioner Bob Anthony announced that he had been cooperating with federal law enforcement authorities since 1988 in an investigation of corruption at the Commission. Commissioner Anthony stated that there had been "serious irregularities and unethical conduct" involving Bell's PUD 260 hearing. Contrary to the claim in Bell's Petition, Commissioner Anthony announced that his investigation had also disclosed unethical conduct and *ex parte* communications by representatives of another Oklahoma utility: Oklahoma Natural Gas Company.[1] Subsequently, Commissioner Anthony has indicated that the attorney who acted unethically while representing Oklahoma Natural Gas Company was the same attorney who offered Anthony cash while representing Bell.

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[1] Anthony's announcement regarding Oklahoma Natural Gas Company immediately preceded his announcement regarding Bell but referenced a separate Commission docket number.

Claiming that Commissioner Anthony was biased against it, Bell sought Commissioner Anthony's recusal from the PUD 260 remand and from any other pending or future Commission proceedings involving Bell. In response, Commissioner Anthony asserted that Bell knew or should have known of his investigatory role as early as April 10, 1991, prior to the Oklahoma Supreme Court's remand of PUD 260 and prior to the Commission's hearing of a subsequent rate case, Cause No. PUD 000662 ("PUD 662"). In an effort to document his claim, Commissioner Anthony filed a motion in PUD 260 seeking to compel the production of certain corroborating documents from the Bell officials with whom he met on April 10, 1991. It was Commissioner Anthony's contention that the Bell officials who attended the meeting had reason to know of his cooperation with law enforcement. Bell refused to produce the documents and Anthony refused to recuse himself.

Upon Anthony's refusal to recuse himself, Bell mounted a two-pronged assault. First, Bell petitioned the Oklahoma Supreme Court in the case below[2] for an extraordinary writ disqualifying Commissioner Anthony from participating in the PUD 260 remand and in any other present or future Commission proceeding to which Bell was

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[2] *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, Oklahoma Supreme Court Case No. 80,579.

a party. Secondly, Bell amended its pending appeal of PUD 662[3] to include Commissioner Anthony's alleged bias as an additional ground of error. The Oklahoma Supreme Court subsequently appointed a Special Master in the PUD 662 appeal to conduct an evidentiary hearing into the issue of whether Bell knew or should have known of Commissioner Anthony's cooperation with federal authorities prior to filing its appeal.

On May 25, 1993, the Oklahoma Supreme Court issued its initial opinion in the case below. Pet. App. 60a-74a. The court's decision threw out more than 70 years of Oklahoma precedent and held for the first time that utility ratemaking by the Corporation Commission is an adjudicative function. When this was brought to the court's attention in a petition for rehearing, the initial decision was withdrawn and the opinion set forth at Pet. App. 1a-59a was issued.

In its final opinion, the court below recognized the ample authority from its own jurisprudence, and the jurisprudence of this Court, that the establishment of utility rates is a legislative function rather than an adjudicative one. Pet. App. 5a-10a. As such, the court below correctly recognized that the specific relief requested by Bell is not

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[3] *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, Oklahoma Supreme Court Case No. 80,333.

mandated by constitutional due process. 10a. Contrary to Bell's mischaracterization, the court did *not* hold "that the Due Process Clause places *no* limitations on the conduct of legislative proceedings." Pet. 7 (emphasis in original). Neither did the court indicate that it would "deny *all* due process claims arising from ratemaking proceedings." *Id.* (emphasis in original). In reality, the Oklahoma Supreme Court expressly recognized Bell's right to voice its due process concerns on appeal of the Commission's PUD 260 remand order. Pet. App. 12a. The court noted that, in such an event, it would exercise its independent judgment as to both the law and facts as required by the Oklahoma Constitution. *Id.* at 13a.

The court also expressly recognized Bell's right to seek Commissioner Anthony's recusal in any *adjudicative* matter coming before the Commission. *Id.* at 14a. In *dicta*, the court recognized the difficulties such a course would raise, given the absence of any Oklahoma constitutional or statutory provision for naming a replacement Commissioner. *Id.* at 14a-15a. The court also recognized the *possibility* that it might have to resort to the Rule of Necessity in such an instance. *Id.* In further *dicta*, the court suggested, *but did not decide*, that heightened appellate scrutiny might be an alternative way to satisfy due process in such an instance. *Id.* at 15a-17a. However, the court clearly evidenced a

willingness to "implement some...procedure to reach a just resolution.... *Id.* at 17a.

Meanwhile, the Special Master had concluded the evidentiary hearing ordered by the court in the PUD 662 appeal. The Report of the Special Master was issued June 28, 1993, and is reproduced for this Court's convenience at Appendix B to this Response. The evidence showed that during the hearing on the merits of PUD 260 and the pendency of PUD 662 before the Commission, an attorney representing Bell and a senior Bell official gave Commissioner Anthony illegal cash contributions for the express purpose of gaining "access" to him.[4] Commissioner Anthony immediately turned the cash over to federal law enforcement authorities. Commissioner Anthony has subsequently indicated his belief that a former Commissioner who heard PUD 260 may have accepted improper contributions from these same Bell representatives. At this writing, the former Commissioner and the Bell attorney have been indicted on federal bribery and conspiracy charges and are awaiting trial.

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[4] Bell has not denied that the offers or payments occurred, but maintains that "[a]ny impropriety...was not authorized by or attributable to it." Pet. 3, n. 1. However, these are questions of fact and law which have yet to be answered.

Ultimately, the Special Master concluded that Bell did not know of Commissioner Anthony's cooperation with federal law enforcement authorities until his October 2, 1992, announcement. App. 4a. However, the Special Master also concluded that Bell knew, prior to Commissioner Anthony's announcement, that he had accepted what he believed to be illegal cash contributions from Bell's representatives. *Id* at 5a. The Special Master also concluded that such knowledge would have been grounds to move for Commissioner Anthony's disqualification prior to the hearings in PUD 260 and PUD 662, and prior to his decision in those hearings. *Id.* However, the Special Master concluded that Commissioner Anthony's belief was not objectionable to Bell *until it learned that Commissioner Anthony was cooperating with law enforcement officials*. *Id.* at 4a-5a.

The Special Master concluded that the evidence raised two additional unresolved questions:

1. Where a party has knowledge which is grounds for the disqualification of a Commissioner but does not ask for disqualification until after an adverse ruling has been made, can such party then seek the disqualification of the Commissioner on another ground?

2. As a matter of law, is a judge, or a Commissioner, automatically disqualified from hearing a case based on the misconduct of the party seeking to disqualify him?

Id. at 6a.

The Special Master went on to suggest that an additional evidentiary hearing be held to answer these questions. *Id.* As of this writing, the Oklahoma Supreme Court has not yet addressed these important questions.

SUMMARY OF ARGUMENT

Bell's Petition should be denied for several reasons. First, finality is not present. The Oklahoma Supreme Court has not yet determined whether Commissioner Anthony is biased or whether his participation in the PUD 260 remand violates constitutional due process. Further, open questions of fact and law remain before the court below concerning Bell's right to seek Commissioner Anthony's disqualification.

Secondly, Bell's Petition should be denied because Bell has another, more appropriate remedy available. Under Oklahoma law, Bell is entitled to an evidentiary hearing before the Commission, together with an appeal of right to, and an independent judicial review by the Oklahoma Supreme Court.

Thirdly, Bell's Petition should be denied because the Oklahoma Supreme Court has committed no error. It has merely applied the precedent of this Court which holds that constitutional due process does not require the recusal of a Commissioner from a legislative proceeding, even if the Commissioner believes that the party appearing before him

has committed a crime, so long as his mind is not irrevocably closed. Bell has made no such showing in this case.

Fourthly, Bell's claim of a split of authority among the states provides no support for its Petition. Federal constitutional due process does not demand the imposition of judicial procedural protections to state utility rate hearings. States are free to impose such protections as a matter of state law, but are not required to do so by the U.S. Constitution.

ARGUMENT

I. BELL'S PETITION SHOULD BE DENIED BECAUSE FINALITY IS ABSENT: THE OKLAHOMA SUPREME COURT HAS NOT DECIDED WHETHER COMMISSIONER ANTHONY IS BIASED, WHETHER HIS PARTICIPATION IN THE PUD 260 VIOLATES DUE PROCESS, OR WHETHER BELL HAS THE RIGHT TO SEEK COMMISSIONER ANTHONY'S DISQUALIFICATION.

A. Certiorari Should not be Granted Where Finality is not Present.

The writ of certiorari does not lie until the proceedings sought to be reviewed are completed, and a final determination had. *Patterson v. U.S.*, 15 U.S. (2 Wheat.) 221 (1817). Finality is not present here because the Oklahoma Supreme Court has not yet decided whether Commissioner Anthony is, in fact, biased, whether his participation in the PUD 260 remand violates constitutional

due process, or whether the actions of Bell's representatives preclude Bell from seeking Anthony's disqualification.

B. The Oklahoma Supreme Court has not Ruled on Bell's Claim of Bias or Whether Commissioner Anthony's Participation in the PUD 260 Remand is a Denial of Constitutional Due Process. The Court has Only Ruled That Bell is not Entitled to a Pre-hearing Disqualification of Anthony and Must Raise its Claim on Appeal.

Bell claims that the Oklahoma Supreme Court has determined "that the Due Process Clause places *no* limitations on the conduct of legislative proceedings." Pet. 7 (emphasis in original). Bell also claims that the court's reasoning "would compel it to deny *all* due process claims arising from ratemaking proceedings." *Id.* Bell also argues that "the court simply held that 'due process notice and hearing requirements' are 'inapplicabl[e]' to legislative proceedings and concluded, without more, that no due process violation had occurred." *Id.* at 13. These statements are untrue.

In reality, the court below decided only that Bell is not entitled to the particular remedy it is requesting, i.e., disqualification of Commissioner Anthony prior to the PUD 260 remand hearing. The court clearly recognized the applicability of constitutional due process to even legislative proceedings. Pet. App. at 6a & 9a-10a. Moreover, the court's opinion makes it abundantly clear that Bell is free to

assert its claim of bias on appeal, when there is an evidentiary record to examine. *Id.* at 12a-13a. Further, the court made it clear that if Bell should bring such an appeal, it would not be bound by the findings and conclusions of the Commission but would exercise its independent judgment as to both the law and the facts. *Id.*

Thus, contrary to Bell's Petition, the Oklahoma Supreme Court has not determined that Commissioner Anthony is or is not biased, nor has the court determined that due process is inapplicable to legislative proceedings.

C. The Oklahoma Supreme Court has not yet Ruled on Significant Questions of Law and Fact Impacting Bell's Petition: Whether the Bell Representatives Who Offered Money to Commissioner Anthony were Acting on Bell's Behalf and, if so, Whether Bell's Misconduct Precludes it From Seeking Anthony's Disqualification.

As noted above in the Statement of the Case, the Oklahoma Supreme Court has yet to rule on significant issues of law and fact which directly bear on the question of whether Bell can seek Commissioner Anthony's disqualification in the case below. The open issues are:

1. Whether the illegal acts of Bell's representatives are attributable to Bell; and

2. Whether Bell is entitled to seek Anthony's disqualification in the case below.

Although these questions are specifically pending in the PUD 662 appeal, they will have a very real impact upon the issues in this case. It is particularly significant that the evidence presented to the Special Master indicated that the wrongdoing by Bell's representatives occurred in connection with *PUD 260*, not PUD 662.

Constitutional rights, like other legal rights, can be waived or their assertion barred by deliberate election or by conduct inconsistent with such right. *See, e.g., Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U.S. 125, 128-9 (1922). If the Oklahoma Supreme Court subsequently accepts the recommendation of its Special Master, it may ultimately determine that Bell improperly attempted to influence Commissioner Anthony *in Bell's favor* in connection with PUD 260, and was content to live with such bias until it learned Anthony was cooperating with law enforcement. If so, Bell could hardly be heard to complain that Commissioner Anthony should be disqualified from the PUD 260 remand because of a belief that Bell's representatives acted illegally. There is no authority for a party who "poisons its own well" by trying to illegally influence an elected official to complain of bias when the official cooperates with law enforcement authorities.

By granting the relief requested in Bell's Petition before these important factual and legal issues are resolved, this Court could deny the citizens of Oklahoma their right to have their utility rates determined by a Commissioner which they elected. Bell has provided no authority for such an extraordinary remedy. Further, as discussed below, denial

of Bell's writ will not result in a denial of constitutional due process to Bell on the PUD 260 remand.

II. BELL'S PETITION SHOULD BE DENIED BECAUSE ANOTHER MORE APPROPRIATE REMEDY IS AVAILABLE.

A. Certiorari Should be Denied Where an Adequate Alternative Remedy is Available.

It is well settled that the extraordinary remedy of certiorari will be refused where the petitioner has another adequate remedy available. *In re Tampa Suburban Railroad Co.*, 168 U.S. 583 (1897); *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1799). Bell's Petition should be denied because it has such a remedy: An evidentiary hearing in the PUD 260 remand, including the right to present and rebut evidence, public deliberations of the Commission's decision, and an appeal of right to the Oklahoma Supreme Court which will independently review constitutional claims.

B. The Oklahoma Supreme Court's Decision Does not Deprive Bell of Substantial Justice Since Bell is Assured of a Number of Procedural Safeguards to Protect its Interests, Including the Right to an Evidentiary Hearing Before the Commission and an Appeal of Right to the Oklahoma Supreme Court.

The decision below works no significant hardship on Bell. Regardless of the decision of this Court, Bell will be compelled to go forward with the PUD 260 remand before the Commission in order to finally determine the impact of the Tax Reform Act of 1986. Neither the presence nor absence of Commissioner Anthony will significantly affect Bell's burden in the proceeding.

Further, Article IX, § 18, of the Oklahoma Constitution guarantees that Bell will receive notice and a hearing, including the opportunity to present evidence. Pet. App. 106a. As a three-member body, the vote of at least two Commissioners is required on all substantive matters. Okla. Const. art. IX, § 15; Pet. App. at 103a). In addition, Oklahoma's Open Meeting Act, Okla. Stat. tit. 25, §§ 301-314 (1991 & Supp. 1993), requires the Commissioners to conduct their deliberations and cast their votes publicly, with prior notice and preparation of written minutes summarizing their actions. The relevant portions of Oklahoma's Open Meeting Act are reproduced at Appendix C for the Court's convenience.

At the conclusion of the PUD 260 remand, Bell has an *appeal of right* to the Oklahoma Supreme Court. Okla. Stat. art. IX, § 20; Pet. App. at 108a-110a. Upon Bell's assertion of a violation of constitutional due process, the court is not bound by the Commission's actions but is required to exercise its own independent judgment as to both the law and facts. *Id.* If Bell is dissatisfied with the decision of the Oklahoma Supreme Court, it retains, of course, the option of petitioning this Court for review.

As can be seen from the foregoing, denial of Bell's Petition in this case will not impose an unreasonable hardship on Bell, but will merely require it to do what it would be

required to do absent any allegations of bias by Commissioner Anthony. Thus, this issue is not yet ready for this Court's review.

III. BELL'S PETITION SHOULD BE DENIED BECAUSE THE OKLAHOMA SUPREME COURT HAS COMMITTED NO ERROR: ITS DECISION DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS AND IS CONSISTENT WITH THIS COURT'S *APPLICABLE* DUE PROCESS PRECEDENTS.

A. Constitutional Due Process is a Fluid, Rather Than a Rigid Concept, With The Process Due Being Determined by The Surrounding Circumstances.

Bell attempts to define constitutional due process as an "all or nothing" concept by equating it only with trial-type, adjudicative procedural safeguards. However, it is well settled that constitutional "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord Mathews v. Eldridge*, 424 U.S. 319, 334-5 (1976). The jurisprudence of this Court makes it clear that "procedural due process in the administrative setting does not always require application of the judicial model." *Dixon v. Love*, 431 U.S. 105, 115 (1977). Among the factors which this Court has considered

in its due process analysis is the nature of the administrative hearing at issue.

B. Constitutional Due Process Does Not Demand The Same Procedural Safeguards in Legislative Proceedings as in Individual Adjudications.

Contrary to Bell's assertions, this Court has recognized that the distinction between judicial and legislative functions is an element of due process analysis. *F.C.C. v. WJR, the Goodwill Station*, 337 U.S. 265, 276 (1949); *accord U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). This Court has also clearly recognized that the standard for disqualifying an administrative decision-maker is substantially different in a legislative proceeding than in an adjudication. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). Constitutional due process does not require the disqualification of an administrative decision-maker in a legislative proceeding, even where he believes that the party before him has committed a crime, unless it is shown that his mind is "irrevocably closed" on the issues before him. *Id.* at 701. Absent such a showing, due process is satisfied by an opportunity to persuade the decision-maker through an evidentiary hearing. *Id.*

The bias which Bell alleges in connection with PUD 260 is even more remote than that alleged in *Cement Institute*. In *Cement Institute*, the Commissioners were alleged to have prejudged *the very issue they ultimately decided*, i.e., whether the activity complained of was illegal. In contrast, Commissioner Anthony will *never* have before

him the issue of whether the cash payments received from Bell's representatives were illegal or whether those payments were authorized by or attributable to Bell. All Commissioner Anthony will be called upon to decide in the PUD 260 remand are the four issues remanded by the Oklahoma Supreme Court. Bell will be free to participate in the evidentiary hearing to the extent it believes necessary and, as noted previously, has an appeal of right to the Oklahoma Supreme Court, which will exercise its independent judgment as to the law and facts related to constitutional issues.

C. The Oklahoma Corporation Commission is Acting in a Legislative Capacity in the PUD 260 Remand.

In the seminal case of *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224 (1908), this Court recognized that state administrative bodies may be clothed with legislative, judicial and executive powers. This Court also recognized that such an entity acts in a legislative capacity where its action "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* at 227. This is true even where the agency must decide judicial type issues in the process. *Id.* *Prentis* also clearly recognized that "[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind." *Id.* at 226 (emphasis added).

Based upon a state constitution virtually identical to that in *Prentis*, the Oklahoma Supreme Court has long recognized that the Oklahoma Corporation Commission is clothed with the powers of all three branches of government. *Continental Telephone Co. v. Hunter*, 590 P.2d 667, 668

(Okla. 1979); *Oklahoma Hardware Co. v. Common Carrier Division*, 405 P.2d 87, 90 (Okla. 1965); *In re Central Airlines, Inc.*, 185 P.2d 925 (Okla.1947). For more than 70 years, the Oklahoma Supreme Court has also recognized that the Corporation Commission acts in a legislative capacity when establishing utility rates. *See Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507, 509 (Okla. 1977); *Arkansas Louisiana Gas Co. v. Sun Oil Co.*, 554 P.2d 14, 16 (Okla. 1976); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957, 958 (Okla. 1967); *Community Natural Gas Co. v. Corporation Commission*, 76 P.2d 393, 399 (Okla. 1938); *Southern Oil Corp. v. Yale Natural Gas Co.*, 214 P. 131, 135 (Okla. 1923); *City of Bartlesville v. Corporation Commission*, 199 P. 396, 398 (Okla. 1921); *Muskogee Gas & Electric Co. v. State*, 186 P. 730, 731 (Okla. 1920); *see also Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F.2d 596, 598 (10th Cir. 1931). Bell is, or should be intimately familiar with the court's most recent confirmation of this principle since it occurred in the Bell rate case immediately preceding PUD 260. *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309, 1317 (Okla. 1988). Bell simply ignores these precedents in its Petition.

Nor are these Oklahoma precedents contrary to those of this Court. The viability of the *Prentis* distinction between judicial and legislative proceedings has been recently recognized by this Court. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370-1 (1989); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-7 (1983). This Court has also clearly recognized that ratemaking is a legislative function. *Feldman*, 460 U.S. at 371; *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1944).

Bell asserts that the PUD 260 remand is adjudicative rather than legislative since it is directed specifically against Bell. This assertion is wrong for several reasons.

First, as noted in the statement of facts above, PUD 260 was an inquiry by the Corporation Commission into the effect of the 1986 Tax Reform Act on *all 12* major Oklahoma utilities, not just Bell. The inquiry was simply broken down into company-by-company phases to make the process manageable. This is virtually identical to the procedure which this Court found to be legislative in *Prentis* wherein the Virginia Corporation Commission, in a single proceeding, established *different rates* for all the railroad companies operating in the state. *Prentis*, *supra*, 211 U.S. at 225.

Secondly, even assuming that PUD 260 is aimed specifically at Bell, there can be no dispute that it was and is still a legislative proceeding under *Prentis*. In its original PUD 260 order, the Commission ordered Bell to reduce certain of its rates *on a going-forward basis*, effective January 1, 1987. Pet. App. at 80a & 81a, n. 10. The Commission did not render judgment imposing any liability on Bell or depriving it of some property right. In a clearly legislative action, the Commission ordered that the surplus cash collected during the pendency of the case be used to upgrade Bell's Oklahoma network *as a matter of policy to implement the Commission's long-standing goal of universal, single-party service to all Bell customers*. *Id.* at 86a-87a. As explained by the Oklahoma Supreme Court:

> The Commission found that "[u]pgrading multi-party service to single-party service will directly benefit approximately 54,000 Oklahoma customers who now have multi-party service. The Commission notes that

> the public comments submitted to this Commission overwhelmingly favored the proposed upgrade programs. *All ratepayers will benefit from these programs*....[T]he capital improvement plan proposed by the Staff avoids the borrowing costs and other costs that would normally be associated with such an upgrade. Such borrowing costs would normally be permissible and recoverable by [Bell] as costs of service. *By avoiding such costs, rates are kept lower for all Oklahoma ratepayers*."

Id. at 87a, n. 27 (emphasis added).

The Oklahoma Supreme Court largely affirmed the Commission's actions in PUD 260. However, because the court found the Commission's evidentiary record to be deficient in four specific areas, it remanded PUD 260 for additional hearings. The remand proceeding is not an effort by the Commission to punish Bell or take something away from it. The remand is simply a continuation of the original PUD 260 rate proceeding intended to clarify the exact impact of the Tax Reform Act. Clearly both PUD 260 and the PUD 260 remand are legislative proceedings as defined by *Prentis*.

Bell's assertion that ratemaking directed at a named utility is adjudicative misconstrues this Court's precedents. Bell's conclusion is based on *dicta* in *U.S. v. Florida East Coast Railway Co.*, *supra*, distinguishing the cases of *Londoner v. City of Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). However, a closer review of these cases clearly shows that they do not support Bell's proposition but, instead, are consistent with the decision of the Oklahoma Supreme Court below.

Londoner clearly involved an adjudication under the *Prentis* paradigm. There, an arm of the state sought to deprive individual landowners of their property, without a hearing, for past liabilities. Although the Court recognized that "[m]any requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature," it held that due process required some type of hearing before the deprivation of property. *Londoner, supra,* 210 U.S. at 386. Of critical importance to the Court's decision was the fact that state law provided the landowners no opportunity to appeal. The obvious reason is that a right of appeal would have satisfied the requirement of due process.

In contrast, *Bi-Metallic* clearly involved a legislative proceeding under the *Prentis* paradigm. There, an arm of the state sought to increase the value of all taxable property within a county for purposes of *future* tax assessments. Like the Oklahoma Supreme Court in the case below, this Court held that the demands of constitutional due process are less stringent in a legislative proceeding and that no hearing was required. In distinguishing *Londoner*, the Court made it clear that the number of affected individuals is not the sole determining factor:

> [In *Londoner*, a] relatively small number of persons was concerned, *who were exceptionally affected*, in each case upon *individual grounds*, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Bi-Metallic, supra, 239 U.S. at 446 (emphasis added).

As in *Bi-Metallic*, the Commission's actions in PUD 260 imposed future changes which impacted all of Bell's customers. Unlike *Londoner*, the Commission imposed no liabilities on Bell and did not deprive it of any property right. The PUD 260 remand is merely a court-mandated continuation of the original proceeding. Thus, PUD 260 and the PUD 260 remand are legislative proceedings under this Court's authority.

IV. THE STATES NEED NO GUIDANCE FROM THIS COURT. THEY ARE MERELY RECOGNIZING THIS COURT'S LEGISLATIVE/ ADJUDICATION DISTINCTION AND THE DIFFERENCES IN STATE LAW.

Bell claims that there is confusion among the various states which this Court needs to resolve. However, a review of the cases cited indicates that Bell is confusing the requirements of the U.S. Constitution from those imposed by state law. Bell fails to cite a single case in which a state court's characterization of utility ratemaking has denied a party the procedural safeguards required by the U.S. Constitution. There simply is no "emergency" demanding this Court's intervention. Further, even if a state chooses to characterize ratemaking as judicial and extends every conceivable procedural safeguard to the parties, it does not follow that federal due process requires such action or that guidance from this Court is required.

The Due Process Clause of the 14th Amendment acts as a limitation on state action. It sets forth the *minimum* due process requirements which states must satisfy. States are free to afford more protection, but not less. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Further, what constitutional due

process demands in one state it does not necessarily demand in another. *Bowman v. Lewis*, 101 U.S. 22, 31 (1880). "This clause...leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers...." *Bute v. Illinois*, 333 U.S. 640, 649-50 (1948).

As has been previously and clearly stated, the People of the State of Oklahoma have determined that public utility ratemaking by the Corporation Commission is a legislative function. As such, the jurisprudence of this Court holds that the procedural safeguards associated with formal adjudications are not required by the U.S. Constitution. Further, as previously noted, the decision rendered by the Oklahoma Supreme Court will afford Bell sufficient procedural safeguards to protect its interests.

V. THE OKLAHOMA SUPREME COURT'S *DICTA* REGARDING THE RULE OF NECESSITY DOES NOT REQUIRE THIS COURT'S INTERVENTION.

As noted previously herein, the decision below does not apply the Rule of Necessity, but merely discusses it in *dicta*. This is not a sufficient basis for the exercise of this Court's extraordinary jurisdiction. A review by this Court may be appropriate, if at all, when and if the Oklahoma Supreme Court applies the rule.

CONCLUSION

For all the above and foregoing reason, the Attorney General of the State of Oklahoma respectfully requests this Court to deny Bell's Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

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August 12, 1994

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Appendix A

OKLA. STAT. TIT. 74, SEC. 18b(A)(20) (SUPP.1993)

Sec. 18b. Duties of Attorney General - Counsel of Corporation Commission as representative on appeal from Commission.

A. The duties of the Attorney General as the chief law officer of the state shall be:

....

20. To represent and protect the collective interests of all utility customers of this state in rate-related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding.

....

Appendix B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Appellant,	)	
v.	)	No. 80,333 (cons. w/Nos. 80,334 80,340, 80,342 and 80,345)
OKLAHOMA CORPORATION COMMISSION and the STATE OF OKLAHOMA,	)	
Appellees.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Petitioner,	)	
v.	)	No. 81,735
OKLAHOMA CORPORATION COMMISSION	)	
Respondent.	)	
SUSAN B. LOVING, ATTORNEY GENERAL,	)	

Petitioner,	)	
v.	)	No. 81,783
OKLAHOMA CORPORATION COMMISSION	)	
Respondent.	)	

REPORT OF SPECIAL MASTER

This matter came on for hearing pursuant to a referral Order of the Oklahoma Supreme Court dated June 28, 1993, directing the special master to conduct a hearing and to submit findings of fact and conclusions of law as to the following questions:

1. Was Commissioner Anthony an FBI informant during the period of time Commission Cause No. PUD-662 was pending before the Corporation Commission, including both the evidentiary and deliberative phase?

2. When did Southwestern Bell Telephone Company know, or should have known, of his involvement as an informant?

3. What was the earliest date of that actual or imputed knowledge?

The special master was not directed to consider any evidence of wrongdoing on the part of SWBT. The evidentiary hearing was held on September 3, 1993. Based

on the evidence introduced at that hearing, the special master makes this report.

FINDINGS OF FACT

1. The parties stipulated that Commissioner Anthony did serve as an informant for the Federal Bureau of Investigation (FBI) from December, 1988, to at least October 2, 1992, in connection with an investigation of suspected wrongdoing at the Corporation Commission.

2. Commissioner Anthony was actively assisting the FBI during the entire time that PUD-662 was pending before the Commission.

3. Commissioner Anthony's activities in connection with the FBI investigation included contacts with representatives of Southwestern Bell Telephone Company (SWBT), among others. In this connection evidence was received at the evidentiary hearing that Commissioner Anthony made recordings of his conversations and meetings with SWBT agents and employees. Such evidence was that Commissioner Anthony had received illegal cash contributions (which he immediately gave to the FBI) from William Anderson, attorney for SWBT in PUD-260 and PuD-662 pending before the Commission during the period in question and from David Miller, SWBT's Vice President in Oklahoma for Governmental and Regulation Affairs and also a registered lobbyist for SWBT. The further evidence in this regard was that the cash was accompanied by false lists of contributors. This was given for the asserted purpose of having "access" to him, which was no more or no less than an effort to have him look with favor on their pending rate matters.

4. There was no evidence that SWBT or any of its agents or employees learned of Commissioner Anthony's role as an informant until he publicly announced his cooperation with the FBI on October 2, 1992. On the issue of whether SWBT should have known that Commissioner Anthony was cooperating with the FBI, there was ample evidence submitted in the evidentiary hearing concerning Mr. Anthony's efforts to maintain the secrecy of his role as an informant, such evidence being sufficient to outweigh any assertions that SWBT should have, in the exercise of reasonable diligence, discovered Anthony's role with the FBI prior to his public announcement on October 2, 1992.

5. Even if it should be determined that SWBT should have had some suspicions that Commissioner Anthony was cooperating with the FBI, a diligent attempt by SWBT to confirm such suspicions would have revealed nothing since, again, Mr. Anthony was certainly trying to keep that relationship a secret. Moreover, the FBI, under its established policies, would not have revealed anything about his cooperating with them.

6. Due to the very limited scope of the special master's inquiry mandated by the Supreme Court, it should be noted that SWBT did not offer any evidence, if they had such evidence, to rebut the testimony of Commissioner Bob Anthony relating to illegal contributions to him by William Anderson and David Miller.

7. When Mr. Anthony voted in PUD-662 by Order 367868 to reduce SWBT's rates by $93.7 million dollars annually and order SWBT to refund $184.4 million dollars to its customers, SWBT brought this lawsuit asking for a new trial on the grounds that it did not know that Mr. Anthony was acting as an FBI informant. SWBT contends

that Anthony's actions denied them "due process" as he was biased and consequently they did not receive a fair hearing, and if they had known of such activities on his part they would have sought to disqualify him from participating in their case.

CONCLUSIONS OF LAW

1. Based on the facts set out above, the issues submitted for resolution by the special master are answered as follows:

> 1. Was Commissioner Anthony an FBI informant during the period of time Commission Cause no. PUD-662 was pending before the Corporation Commission, including both the evidentiary and deliberative phase?
>
> Answer: Yes.
>
> 2. When did Southwestern Bell Telephone Company know, or should have known, of his involvement as an informant:
>
> Answer: October 2, 1992.
>
> 3. What was the earliest date of that actual or imputed knowledge:
>
> Answer: October 2, 1992.

2. From the greater weight of the evidence heard by the special laster as set out above, it is concluded that SWBT knew that Commissioner Anthony has ostensibly accepted what he believed to be illegal cash contributions

from their employees which would certainly have been grounds for SWBT to move for his disqualification prior to any hearings and prior to his decision in those hearings. Obviously SWBT believed it to be in its best interests not to seek his disqualification.

3. Once Commissioner Anthony had voted against SWBT's interests and publicly announced his four (4) years of full cooperation with the FBI's investigation of the Commission, SWBT seeks in this case to receive a new trial. This raises many issues and questions. One question is whether a party to an action can require that the trier of the facts be disqualified because of such party's own wrongdoing. If there had been no illegal cash contributions or wrongdoing on the part of SWBT, then certainly SWBT would not have any reasonable grounds for believing Commissioner Anthony would be biased against it.

4. If the only issue the Oklahoma Supreme Court wants to consider is whether Commissioner Anthony was assisting the FBI in an investigation of the Commission and this was not known or could not have been known by SWBT, then it is respectfully submitted that a new trial before the Commission should be granted. It is further recommended that the special master that such new trial should not be de novo unless the Supreme Court is of the opinion that Commissioner Anthony's alleged or presumed bias did in some way affect the evidentiary hearing conducted by Administrative Law Judge Goldfield or his decision.

5. On the other hand, if the Supreme Court determines that the other questions raised in the evidentiary hearing before the special master should be resolved before this appeal can be decided, then it suggested that another

evidentiary hearing will be necessary to determine these issues:

1. Where a party has knowledge which is grounds for the disqualification of a Commissioner but does not ask for disqualification until after an adverse ruling has been made, can such party then seek the disqualification of the Commissioner on another ground?

2. As a matter of law, is a judge, or a Commissioner, automatically disqualified from hearing a case based on the misconduct of the party seeking to disqualify him?

It is suggested that an additional evidentiary hearing would be necessary so as to afford SWBT an opportunity to rebut Commissioner Anthony's testimony and to have the law fully briefed on these issues.

Respectfully submitted this 5th day of October, 1993.

/s/ William S. Myers, Jr.
Judge William S. Myers, Jr.
Special Master

Appendix C

EXCERPTS FROM THE OKLAHOMA OPEN MEETING ACT, OKLA. STAT. TIT. 25, §§ 301-314 (1991 & SUPP. 1993)

§ 302. Public policy. - It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes....

§ 303. Times and places - Advance Notice. - All meetings of public bodies, as defined hereinafter, shall be held at specified times and places which are convenient tot he public and shall be open to the public....All meetings of such public bodies...shall be preceded by advance public notice specifying the time and place of each such meeting to be convened as well as the subject matter or matters to be considered at such meeting....

§ 304. Definitions. - As used in this act:

1. "Public body" means...all...commissions,...in the State of Oklahoma supported in whole or in part by public funds....

2. "Meeting" means the conducting of business of a public body by a majority of its members being personally together.

....

§ 305. Recording of votes. - In all meetings of public bodies, the vote of each member must be publicly cast and recorded.

§ 306. Circumvention of act. - No informal gatherings or any electronic or telephonic communications among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter.

§ 312. Minutes of Meetings. - The proceedings of a public body shall be kept by a person so designated by such public body in the form of written minutes which shall be an official summary of the proceedings showing clearly those members present and absent, all matters considered by the public body, and all actions taken by such public body. The minutes of each meeting shall be open to public inspection....

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No. 94-73

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF AMICI CURIAE, PACIFIC BELL, NEVADA BELL, BELLSOUTH CORPORATION, AND GTE SERVICE CORPORATION AND ITS AFFILIATED DOMESTIC TELEPHONE OPERATING COMPANIES, IN SUPPORT OF THE POSITION OF PETITIONER

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Pacific Bell, Nevada Bell, BellSouth Corporation, and GTE Service Corporation (and its affiliated domestic telephone operating companies) respectfully submit this brief as amici curiae in support of petitioner Southwestern Bell Telephone Company. Letters from

counsel for the parties, consenting to the filing of this brief, have been filed with this Court.

INTEREST OF AMICI CURIAE

Amici curiae are public utilities that are subject to ratemaking proceedings in the States in which they operate, or are parents or affiliates of such public utilities. The issue presented in this case--whether States may deny all procedural due process protection in ratemaking proceedings--is critically important to all public utilities in every State, including amici curiae.

Pacific Bell is a public utility that provides telecommunications services in California. In addition to providing basic telephone services, Pacific Bell provides a broad range of communications services, and has announced plans for $16 billion in investments to develop a communications "superhighway" in California. Pacific Bell's rates are subject to ratemaking proceedings before the California Public Utilities Commission.

Nevada Bell is a public utility that provides a broad range of communications services, including basic telephone services, in Nevada. Nevada Bell's rates are subject to ratemaking proceedings before the Public Service Commission of Nevada.

BellSouth Corporation is principally engaged in the business of providing telecommunications services and products to the public. BellSouth Telecommunications, Inc., its subsidiary, provides telecommunications services, including local telephone services, in Alabama, Kentucky, Louisiana, Mississippi, Tennessee, North Carolina, South Carolina, Georgia and Florida. BellSouth Telecommunications' rates are subject to ratemaking proceedings in each of those States.

GTE Service Corporation is a subsidiary of GTE Corporation, which is engaged in a variety of telecommunications businesses, including the provision of exchange telecommunications and exchange access services by the GTE Telephone Operating Companies.[1] The GTE Telephone Operating Companies serve customers in 29 States; the rates of the GTE Telephone Operating Companies are subject to ratemaking proceedings in each of those States.

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1 Those companies include: GTE California Incorporated; GTE Florida Incorporated; GTE Hawaiian Telephone Company Incorporated; GTE North Incorporated; GTE Northwest Incorporated; GTE South Incorporated; GTE Southwest Incorporated; Contel of California, Inc.; Contel of Kentucky, Inc., d/b/a GTE Kentucky; Contel of Minnesota, Inc., d/b/a GTE Minnesota; Contel of North Carolina, Inc., d/b/a GTE North Carolina; Contel of South Carolina, Inc., d/b/a GTE South Carolina; Contel of Texas, Inc., d/b/a GTE Texas; Contel of the South, Inc., d/b/a GTE Systems of the South; Contel of the West, Inc., d/b/a GTE West; and Contel of Virginia, Inc., d/b/a GTE Virginia.

ARGUMENT

The issue presented in this case--whether States may deny all procedural due process protection in ratemaking proceedings--is critically important to public utilities throughout the country. A State ratemaking proceeding can involve literally billions of dollars; each year, States conduct hundreds of these proceedings, directly impacting public utilities and the lives of their employees, investors and customers. The fundamental question of whether due process is required in such proceedings affects virtually every aspect of ratemaking proceedings including, as in this case, the basic right to an unbiased decisionmaker.

This Court should address this important issue and give the States, and the public utilities they regulate, much-needed guidance on the due process protection required in ratemaking proceedings. The confusion on this issue in the state courts has been widespread. The state courts have reached a wide variety of conclusions in addressing the application of due process in ratemaking proceedings:

- Several courts have squarely held that due process applies in ratemaking proceedings, and requires an impartial decisionmaker. New England Tel. & Tel. Co. v. Public Util., 448 A.2d 272, 280 (Me. 1982) (due

process requires that ratemaking hearings be conducted in an impartial manner); Michigan Intra-State Motor v. PSC, 504 N.W.2d 677, 682 (Mich. App. 1993) (common carrier in ratemaking proceeding was entitled to an impartial decisionmaker); Business & Professional People v. Barnich, 614 N.E.2d 341, 345 (Ill. App. 1993) (judicial conduct principles requiring impartiality apply to commissioners in a ratemaking proceeding).

- The California Supreme Court reviewed this Court's opinions setting forth the constitutional standards for rate proceedings, and concluded that this Court "has long made it clear that within the regulatory context due process is a flexible concept." City of Los Angeles v. Public Utilities Com., 15 Cal. 3d 680, 698 (1975). At a minimum, due process in ratemaking proceedings requires a fair hearing: "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped." City of Los Angeles, 15 Cal. 3d at 698 (emphasis added);

quoting Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).[2]

- As noted by Petitioner, a number of state courts addressing due process issues have recited the adage that "ratemaking is legislative," even though this Court's due process precedents have held that principles of due process do apply to ratemaking proceedings. See Petition for Writ of Certiorari, p. 16, n.4.

In addition, numerous state courts have not yet addressed whether due process is required in ratemaking proceedings. If left unreviewed, the Oklahoma Supreme Court decision could mislead those courts to believe that States may deny all procedural due process protection in ratemaking proceedings.

Thus, it is apparent that there is an immediate need for this Court to address the issue presented. While it should be clear from this Court's precedents that principles of due process apply to ratemaking proceedings, it is undeniable that there has been confusion among the state courts, despite these precedents. See West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63, 70 (1935);

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2 However, the California Supreme Court has not specifically addressed the due process requirements for recusal of a biased decisionmaker in a ratemaking proceeding.

West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 79, 82 (1935). In light of the importance of the issue and the disagreement among the state courts on the constitutional issue involved, this case warrants a grant of certiorari. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 753 n.1 (1985).

The question of whether States may deny all procedural due process in ratemaking proceedings is squarely and dramatically presented in this case. "[A] 'fair trial in a fair tribunal is a basic requirement of due process.'" Withrow v. Larkin, 421 U.S. 35, 46 (1975). If a State can deny a utility the right to an unbiased decisionmaker in a ratemaking proceeding, then States could attempt to conduct ratemaking proceedings without affording utilities any due process protection whatsoever. This Court should make clear that the Constitution does not allow such a result.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Dated: August 15, 1994.

Respectfully submitted,

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BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

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17 pp

PARTIES TO THE PROCEEDING

As noted in Southwestern Bell's petition, the parties to the proceedings below were Southwestern Bell Telephone Company and the Oklahoma Corporation Commission.

The Oklahoma Attorney General now claims, however, that "the Attorney General [enjoyed] the status of party in the case below," *see Brief in Opposition for the State of Oklahoma* at ii.

For the record, neither the State of Oklahoma nor the office of the Attorney General were named in Southwestern Bell's complaint; nor were either of these entities ever granted intervenor status. According to the docket sheet of the Oklahoma Supreme Court, the parties to the proceeding were "Southwestern Bell Telephone Company" and "Corporation Commission." Nor is it apparent how the Oklahoma law on which the Attorney General exclusively relies supports its contention. Nevertheless, Southwestern Bell has no objection to the Attorney General's participation in the proceedings before this Court.

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---

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

INTRODUCTION

The Briefs in opposition, and those of the various *amici curiae*, buttress Southwestern Bell's suggestion that this is a case of unusual practical and doctrinal importance. All of these briefs—including those offered ostensibly "in opposition"—serve to confirm SWB's original contention: This Court should grant certiorari to untangle a vital area of due process analysis.

The issues now are sharply, cleanly joined. On one side stand the nation's state utility regulators, as represented by the Oklahoma Corporation Commission, the State of Oklahoma, and the National Association of Regulatory Utility

Commissioners—the "quasi-governmental" entity that is "the national organization of the State commissions." *See Brief of the National Association of Regulatory Utility Commissioners as Amicus Curiae in Support of Respondent* at 1 ("*NARUC Br.*"); *see also Brief in Opposition for the Oklahoma Corporation Commission* ("*Commission Br.*"); *Brief in Opposition for the State of Oklahoma* ("*State Br.*"). These parties defend the grudging reading of the Due Process Clause adopted below, no doubt sensing that denial of Southwestern Bell's petition would mark a significant step toward freeing regulators from the traditional bounds of due process.

Opposite the regulators stand representatives from the nation's utilities, utility consumers, and the academic community, united in a broad coalition seeking review and reversal of the decision below. *See Brief of Amicus Curiae Public Citizen, Inc. in Support of Certiorari* ("*Public Citizen Br.*"); *Brief of Amicus, Professor Bernard Schwartz, in Support of the Petition for Writ of Certiorari* ("*Schwartz Br.*"); *Brief of Amici Curiae, Pacific Bell, Nevada Bell, BellSouth Corporation, and GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies, in Support of the Position of Petitioner* ("*Utility Br.*"). These parties have concluded that this Court's intervention is required to protect the constitutional rights of consumers, *see Public Citizen Br.* at 5, the constitutional rights of utilities, *see Utility Br.* at 4-7, and the integrity of this Court's due process jurisprudence, *see Schwartz Brief* at 2 ("The Oklahoma Supreme Court's decision . . . violates basic constitutional and administrative law principles."). Whatever the merits of the respective positions of these opposing camps, one overriding point is manifest: There is today a fundamental, nationwide disagreement between state regulators and those they regulate over the meaning of the Due Process Clause.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHEN THE TEST ANNOUNCED IN *MATHEWS v. ELDRIDGE* APPLIES.

No doubt aware that the Oklahoma court's opinion is vulnerable on its own terms, NARUC attempts to shift the basis of the decision to this Court's analysis in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a case not mentioned below. *See NARUC Br.* at 9-16. NARUC argues that the Oklahoma decision may be upheld under *Mathews*, thus contradicting Public Citizen, which concludes, after a more thoughtful analysis, that the Oklahoma Supreme Court's decision is "inconsistent" with *Mathews*. *Public Citizen Br.* at 12.

Whether the decision below is defensible under *Mathews* and whether *Mathews* now governs due process claims in the utility ratemaking context are themselves issues worthy of this Court's consideration. The *Mathews* test was originally deployed to determine the process due to claimants of the "new property." *See* Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural rights in connection with termination of welfare benefits); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of social security benefits); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of public employment); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (termination of government-protected private employment). *Mathews* has also been found helpful in analyzing various other, non-traditional, procedural due process claims. *See Ingraham v. Wright*, 430 U.S. 651 (1977) (student's right to due process before corporal punishment at the hands of school officials); *Lassiter v. Department of Social Servs.*, 452 U.S. 19 (1981) (indigent parent's right to counsel in child custody proceedings).

In many instances, however, it is difficult to predict whether a *Mathews* analysis will be employed. This Court has

applied *Mathews* to the claim that due process requires prior notice and a hearing before prejudgment attachment of real estate. *See Connecticut v. Doehr*, 501 U.S. 1 (1991). But it has failed to apply *Mathews* to the claim that due process requires actual notice before extinguishment of creditors' rights. *See Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 487 (1988). The Court has held that "the traditions and conscience of our people," not *Mathews*, determine what process is due in criminal cases. *Medina v. California*, 112 S. Ct. 2572, 2577 (1992) (internal citations omitted). But it has similarly declined, over a dissent, to apply *Mathews* to a due process claim arising in a civil context. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (relying on "consistent" common-law history to uphold award of punitive damages); *id.* at 54-58 (O'Connor, J., dissenting) (invoking *Mathews* to find the award unconstitutional).

Undoubtedly, two general approaches to procedural due process now compete for primacy in this Court's jurisprudence—one based on tradition, history, and precedent, the other on *Mathews* interest balancing. This case affords a useful vehicle for the Court to clarify the circumstances in which each approach should apply.

II. THE BRIEFS IN OPPOSITION NEITHER REHABILITATE THE DECISION BELOW NOR UNDERMINE SOUTHWESTERN BELL'S ARGUMENTS IN FAVOR OF CERTIORARI.

While the briefs in opposition provide additional reasons for granting certiorari, they do nothing to undermine the reasoning of Southwestern Bell's petition.

First, the striking feature of the 67 pages of briefing offered in opposition is what they do *not* contain—namely, citations to any precedent of this Court holding that, for purposes of due process analysis, ratemaking proceedings are "legislative," hence deserving of the second-class status accorded them below. The Oklahoma Supreme Court's ruling

was founded on the misguided notion that ratemaking proceedings are entitled to little or no due process protection because they are invariably "legislative." *See Petition* at 8-11. The court reached this conclusion by ignoring this Court's due process cases entirely and, instead, misapplying statutory and abstention precedents to Southwestern Bell's claim. *Id.* Significantly, the briefs in opposition do nothing to shore up these weaknesses in that decision; rather, they simply recycle the inapposite authority invoked below. *See Petition* at 10 & n.2 (listing inapposite cases relied on below); *Commission Br.* at 14 (citing these cases); *State Br.* at 19 (same).

Second, the assaults on Southwestern Bell's due process analysis are similarly unconvincing. The State would dismiss (as "dicta") the understanding of this Court's *Londoner/Bi-Metallic* line of due process precedent summarized in *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), and would pretend that the Court's decision in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), turned on a factor (the prospectivity of the relevant tax assessments) that did not figure anywhere in the Court's analysis. *See State Br.* at 22-23. The Corporation Commission would have the Court believe that the *Londoner/Bi-Metallic* precedents apply only to the due process right to a hearing, but do not apply (who knows why?) to the right to an unbiased adjudicator. *Commission Br.* at 17. In addition, the State mischaracterizes Southwestern Bell's position. *Compare State Br.* at 17 (arguing that Southwestern Bell "assert[s]" that this Court has not recognized "that the distinction between judicial and legislative functions is an element of due process analysis") *with Petition* at 9 (arguing that "[t]he Oklahoma Court correctly assumed that the rigid requirements designed for officials performing judicial or quasi-judicial functions are not applicable to those acting in 'legislative' capacities") (quotation marks and citations omitted). These "arguments" are just slippery attempts to avoid or explain away this Court's due process jurisprudence.

Third, the efforts to cast doubt on Southwestern Bell's treatment of the various State cases are also unpersuasive. In particular, the Commission argues that *Business and Professional People for the Public Interest v. Barnich*, 614 N.E. 2d 341 (Ill. App. Ct. 1993), cited by SWB, was decided strictly under the "state Administrative Procedure Act," *Commission Br.* at 20, while the State speculates that various cases relied on by Southwestern Bell may have been decided purely on state-law grounds. *State Br.* at 23-24.

In fact, our adversaries have identified no cases in which Southwestern Bell has mislabeled a state-law decision as a due process precedent. *Barnich*, the one decision named by the opponents, is a case in point. There, the court's ruling, while based secondarily on statutory grounds, was based primarily on grounds that "[t]he *principle of jurisprudence* that one with a personal interest in the subject matter of decision in a case may not act as judge in that case is applicable not just to judges but [also] to . . .commissioners." *Barnich*, 614 N.E. 2d at 345 (emphasis added). This "principle," on which the court primarily relied, is rooted in the Due Process Clause.

III. THE CORPORATION COMMISSION'S ARGUMENT THAT THE PROCEEDINGS BELOW ARE NOT YET FINAL AND THE STATE'S ARGUMENT THAT APPELLATE REVIEW IS AN APPROPRIATE REMEDY FOR BIAS ARE MERITLESS.

Just as NARUC distances itself from the Oklahoma court's reasoning by relying on *Mathews v. Eldridge*, so too the lead arguments of the Corporation Commission and State allow each of them to avoid having squarely to defend the decision below. Although these arguments are decidedly off-base, a somewhat detailed reply to each is required.

First, the Commission's elaborate finality smokescreen requires a brief excursion into both the procedural history of the case and this Court's finality jurisprudence. *See Commission*

Br. at 7-13; *State Br.* at 10-11; *NARUC Br.* at 6-8. The case below, No. 80,579 in the Oklahoma Supreme Court, was an "original proceeding" brought by Southwestern Bell seeking a writ of prohibition "disqualifying Corporation Commissioner Anthony . . . from further participation in Corporation Commission proceeding PUD-260, a rate hearing, as well as in all pending and future SWB cases." *See* Pet. App. at 2a (first sentence of decision below). In response to this petition, the Oklahoma Supreme Court ordered, "ORIGINAL JURISDICTION ASSUMED. PETITION FOR WRIT OF PROHIBITION DENIED. . . ." *See* Pet. App. at 18a (final sentences of decision below).

Because the Oklahoma Supreme Court agreed to "assume" "original jurisdiction" of Southwestern Bell's petition—that is, to treat it as distinct from any appeal of the Corporation Commission's actions in PUD-260 and the other "pending and future" rate cases from which Commissioner Anthony's disqualification was sought—the relevant proceeding for determining finality is case no. 80,579. As to that proceeding, the Oklahoma Supreme Court has issued a "final judgment," *see* 28 U.S.C. § 1257(a), definitively denying Southwestern Bell's request as to both pending and future cases. The Court did not retain jurisdiction over any part of the case; nor remand any issue to a court; nor remand any issue to the Corporation Commission.

To its credit, the Corporation Commission admits that its finality argument contradicts a venerable line of cases holding that writ of prohibition proceedings are stand-alone actions for purposes of determining finality. *See Commission Br.* at 12; *see also, e.g, Madruga v. Superior Court of California*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Bandini Petroleum Co. v. Superior Court of California*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the

meaning of [the predecessor of 28 U.S.C. 1257]."); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 565 (1947) ("The effect of the California Supreme Court's judgment, of course, will be to permit further proceedings by the Municipal Court. But under the rule of *Bandini Petroleum Co. v. Superior Court* . . ., this prohibition proceeding would be an independent suit . . . and the judgment finally disposing of it . . . is a final judgment within the meaning of [the predecessor of 28 U.S.C. 1257]."); *cf. Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-91 (1980) (Court reviews Oklahoma Supreme Court decision denying writ of prohibition without mentioning possibility that decision is not final).

The Commission attempts to avoid application of these precedents, however, by arguing that "[i]n all of those cases, prohibition was sought as a means of challenging the jurisdiction of a lower court," whereas "SWB's petition to the state court for writ of prohibition was in the nature of a motion to recuse." *Commission Br.* at 12. This attempted distinction is specious. Whether a rejected prohibition petition seeks to enjoin an ongoing proceeding altogether or to enjoin only the participation of one particular adjudicator is plainly irrelevant to finality analysis. Moreover, the attempted distinction is also inaccurate. *Bandini Petroleum*, the leading case, involved claims that, while necessarily phrased in jurisdictional terms, *see Black's Law Dictionary* at 1091 (5th ed. 1979) ("Prohibition is that process by which a superior court prevents an inferior court . . . *from exceeding its jurisdiction*) (emphasis added), were "in substance" a contention exactly like Southwestern Bell's—that a regulatory practice "violated the due process clause of the Fourteenth Amendment." 284 U.S. at 13. All the blather about whether this case falls within some finality exception recognized by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *see Commission Br.* at 7-10, is therefore beside the point. This case has no need for finality exceptions; it falls squarely within the finality rule.

Second, the case for granting review is similarly undiminished by the principal argument of the State of Oklahoma—the incredible contention that "[t]he Oklahoma Supreme Court" has not yet "ruled on Bell's claim of bias," *State Br.* at 11, or "whether Commissioner Anthony[']s participation in the PUD 260 remand violates constitutional due process," *id.* at 10; *see generally id.* at 10-16. In presenting this argument, the State amalgamates two distinct contentions: a disingenuous claim that the Oklahoma court did not reach the merits of SWB's disqualification request and an erroneous claim that appellate review, not disqualification, can be an appropriate remedy for bias.

The State insinuates that the Oklahoma court did not deny Southwestern Bell's petition, but simply deferred action on it pending the development of a more complete record before the Corporation Commission. *See, e.g, State Br.* at 12-14. In fact, the court, as the State well knows, framed the issue as whether "judicial standards" of impartiality should apply to PUD-260, a ratemaking proceeding. Pet. App. at 6a. It held that because the PUD-260 proceeding was "legislative," the judicial standards which otherwise would have compelled Commissioner Anthony's disqualification (as the court had held initially) did not apply. *Id.* at 6a, 9a-10a.

To be sure, the court attempted to justify its questionable decision by giving assurances that if "SWB believes that [the remand] proceedings were so unfair because of Anthony's prejudice that the resulting rate order is unreasonable and confiscatory, it would be in a position to assert bias as a ground for reversal of the rate order." *Id.* at 12a-13a. But these statements were given as reasons why the court's result was not unreasonable; not as the specification of some novel remedy for unconstitutional bias. The court itself never claimed, as the State does now, that appellate review can substitute for the disqualification of a biased decisionmaker. *Cf. Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2277 (1993) ("Even appeal and a trial

de novo will not cure a failure to provide a neutral and detached adjudicator"); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge *in the first instance*.") (emphasis added).[1]

CONCLUSION

Southwestern Bell's petition for certiorari should be granted.

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[1] Our opponents offer additional arguments not canvassed here, all of which are meritless, beside the point, or supportive of the need for this Court's review. *See, e.g., Commission Br.* at 13 (arguing that the "Oklahoma Supreme Court's discussion of the rule of necessity" is "merely advisory"); *id.* at 19-21 (arguing that the decision may be upheld under a different due process standard than that applied below); *id.* at 22-25 (arguing that the decision may represent harmless error).

Southwestern Bell will respond, however, to the State's attempt to prejudice this Court by casting Southwestern Bell as the villain (and Commissioner Anthony as the hero) of this drama. In particular, the State would characterize Commissioner Anthony as a mere "witness," who has "cooperated" with the FBI. That characterization, while not false, is misleading, because it seriously understates the role Commissioner Anthony played in the events at issue. From late 1988 until October 1992, Commissioner Anthony devoted a substantial amount of time to, and was an active decisionmaker in, an ongoing investigation directed, at least in part, at Southwestern Bell. Without informing the Oklahoma Attorney General, the Commission's legal staff, or his fellow Commissioners, Commissioner Anthony secretly tape-recorded dozens of conversations involving Southwestern Bell employees and counsel. For four years, then, Commissioner Anthony attempted to perform simultaneously the dual and conflicting roles of neutral and detached arbiter and active undercover agent. At no time during this extended period, did he inform Southwestern Bell's executive management of his investigation. Rather he waited until a few weeks before his 1992 congressional election to disclose that he had been "cooperating" with the FBI in this manner throughout his entire tenure at the Commission.

Respectfully submitted,

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